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In the Supreme Court of the United States

OCTOBER TERM, 1986

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, PETITIONER

v.

DAVID A. FITZGERALD, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether four air traffic controllers, who were dismissed for being absent from work without authorization during an illegal strike, were entitled to "official time" under 5 U.S.C. 7131(a), and were therefore not subject to dismissal, on the ground that notwithstanding the ongoing strike and the absence of negotiations they were "representing an exclusive representative in the negotiation of a collective bargaining agreement."

PARTIES TO THE PROCEEDING

Petitioner is the Department of Transportation, Federal Aviation Administration. Respondents are David Fitzgerald, William Sedgwick, Max Winter, and Carl Vaughn.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of the Department of Transportation, Federal Aviation Administration, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 798 F.2d 461. The August 1, 1984, opinion of the Merit Systems Protection Board (the MSPB) (App., *infra*, 14a-21a) is reported at 22 M.S.P.R. 343 (1984). The MSPB's November 10, 1983, opinion (App., *infra*, 24a-31a) is reported at 18 M.S.P.R. 254 (1983). The four decisions of the presiding MSPB officials (App., *infra*, 32a-64a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 11a) was entered on August 8, 1986. A petition for rehearing was denied on October 3, 1986 (App., *infra*, 12a). On December 24, 1986, Chief Justice Rehnquist entended the

time within which to file a petition for a writ of certiorari to and including February 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 5 U.S.C. 7103(a) provides in pertinent part:

* * * * *

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

* * * * *

2. 5 U.S.C. 7131 provides in pertinent part:

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

3. 5 U.S.C. 7311 provides in pertinent part:

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

* * * * *

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.

4. 18 U.S.C. 1918 provides in pertinent part:

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

* * * * *

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia;

shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.

STATEMENT

1. Title VII of the Civil Service Reform Act of 1978 (the Act), Pub. L. No. 95-454, 92 Stat. 1119, 5 U.S.C. (& Supp. III) 7101 *et seq.*, established a comprehensive statutory scheme governing federal labor-management relations.[1] In enacting the legislation, Congress con-

[1] Title VII replaced the federal labor relations program created in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 Comp.).

cluded that it was in the public interest to allow federal employees to organize, bargain collectively, and participate in labor organizations (5 U.S.C. 7101(a)). Title VII explicitly protects the rights of such employees "to form, join, or assist any labor organization, or to refrain from any such activity" (5 U.S.C. 7102). To facilitate collective bargaining, the Act provides that union representatives engaged in "the negotiation of a collective bargaining agreement" are entitled to "official time" for that purpose "during the time [they] otherwise would be in a duty status" (5 U.S.C. 7131(a)). Certain management decisions are excluded from the scope of negotiations, but an agency must bargain over the procedures by which these reserved management rights are exercised (5 U.S.C. 7106). The Act also provides that the failure to bargain in good faith is an unfair labor practice (5 U.S.C. 7116(a)(5) and (b)(5)), and the Federal Labor Relations Authority (FLRA) was established to supervise the collective bargaining process (5 U.S.C. (& Supp. III) 7104, 7105). In addition, the Act provides for arbitration, if necessary (5 U.S.C. (& Supp. III) 7121, 7122), and it creates a Federal Service Impasses Panel to assist in resolving differences (5 U.S.C. 7119). See generally *Bureau of Alcohol, Tobacco and Firearms (BATF)* v. *Federal Labor Relations Authority*, 464 U.S. 89, 91-92 (1983).

At the same time, however, Congress took note of the "special requirements and needs of the Government," and it directed that the Act "be interpreted in a manner consistent with the requirements of an effective and efficient Government" (5 U.S.C. 7101(b)). Most significantly for present purposes, Congress reinforced provisions of

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Certain federal employees, including members of the military and Foreign Service, and certain agencies, including the General Accounting Office, the Federal Bureau of Investigation, and the Central Intelligence Agency, are excluded from coverage under Title VII (see 5 U.S.C. 7103(a)(2) and (3)).

existing law[2] that made it clear that strikes by federal employees are prohibited. For example, the Act defines "employee" to exclude any person who participates in a strike against the federal government (5 U.S.C. 7103(a)(2)(v)), and it defines "labor organization" to exclude any organization that participates in or calls such a strike (5 U.S.C. 7103(a)(4)(D)). In addition, calling, participating in, or condoning a strike is an unfair labor practice (5 U.S.C. 7116(b)(7)), and a union that willfully violates Section 7116(b)(7) may no longer serve as an exclusive bargaining agent (5 U.S.C. 7120(f)); see generally *BATF*, 464 U.S. at 92; *FAA* v. *PATCO*, 7 F.L.R.A. 34, 36-39 (1981).

2. Respondents were air traffic controllers who were among the over 11,000 controllers removed in 1981 by the Federal Aviation Administration (FAA) for participating in an illegal strike called by their union, the Professional Air Traffic Controllers Organization (PATCO). In addition, they were four of the eleven PATCO regional representatives[3] whose function was to review and approve a collective bargaining agreement prior to its submission to the rank and file for a vote. App., *infra*, 1a-2a; see *Schapansky* v. *Department of Transportation*, 735 F.2d 477, 481 & n.4 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984).

Prior to August 1, 1981, PATCO and the FAA had been engaged in negotiations looking toward a collective bargaining agreement, but the negotiations had become

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[2] *E.g.*, 5 U.S.C. 7311(3) and (4) (prohibiting from government employment any person who strikes against the government or who belongs to an organization of government employees that he knows asserts the right to strike against the government); 18 U.S.C. 1918(3) and (4) (making violation of 5 U.S.C. 7311(3) and (4) a criminal offense).

[3] Vaughn represented the eastern region, Winter the central region, Sedgwick the southern region and Fitzgerald the Pacific region (App., *infra*, 2a n.2).

deadlocked. On that day, the Secretary of Transportation requested that PATCO's negotiating team report to Washington, D.C., to resume negotiations. Each respondent thereafter left for Washington after being told to do so by union officials. None of the four respondents obtained agency authorization for his absence. App., *infra,* 2a, 17a.[4]

On August 3, 1981, PATCO called upon its members to engage in a nationwide strike beginning at 7:00 a.m. eastern daylight time (App., *infra,* 14a, 41a). PATCO's purpose in calling the strike was, in the absence of "prompt governmental capitulation," to "inflict harm of the highest magnitude" upon the airline transportation system, to inconvenience the public, to harm the national economy, and "to place at risk the public safety" (*Schapansky,* 735 F.2d at 484; see App., *infra,* 2a (citing *Schapansky* as the case setting out the "basic facts" of the strike)).[5]

At 11:00 a.m. eastern daylight time on August 3, 1981, the President of the United States stated that air traffic controllers who had not reported to work were "in violation of the law" and announced that if they failed to return to work within 48 hours "they [would] forfeit[] their jobs and [would] be terminated" (App., *infra,* 41a). The Secretary of Transportation, who was with the President

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[4] Respondents Fitzgerald, Winter, and Sedgwick did not contend to the MSPB that their absences during the strike were officially authorized by the agency (App., *infra,* 16a). In fact, Winter was contacted by his supervisor on August 2, 1981, and was directed to report for duty (*ibid.*). He did not advise his supervisor that he intended instead to travel to Washington at his union's request (*id.* at 16a-17a). Only respondent Vaughn claimed to have received his agency's approval for his absence during the strike, but the MSPB found, as a factual matter, that the FAA did not authorize his absence (*id.* at 17a, 37a).

[5] Between August 3, 1981, and August 8, 1981, 26,000 flights were cancelled and 23 air traffic control facilities were closed (see *PATCO* v. *Federal Labor Relations Authority,* 685 F.2d 547, 551 n.4 (D.C. Cir. 1982); *FAA* v. *PATCO,* 7 F.L.R.A. 34, 41 (1981)).

at the time of the announcement, added that there would be no negotiations with the union while the strike continued. Also on August 3 the FAA announced that it would only negotiate with people who were on the job working as controllers. The FAA subsequently implemented the President's 48-hour announcement by sending a notice of proposed removal to each controller who failed to report for duty on his first scheduled shift after 11:00 a.m. eastern daylight time on August 5, 1981. As a result, over 11,000 controllers, including respondents, were removed from their positions by the FAA. *Id.* at 2a, 3a, 9a n.11, 19a, 33a; *Anderson* v. *Department of Transportation,* 735 F.2d 537, 539 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); 17 Weekly Comp. Pres. Doc. 845, 846, 848 (Aug. 3, 1981).

3. Each respondent appealed his removal to the MSPB, arguing, inter alia, that his absence from work stemmed from his participation in collective bargaining negotiations and that he was therefore entitled to "official time" under 5 U.S.C. 7131(a). After evidentiary hearings, four different MSPB presiding officials, in separate decisions, rejected respondents' defenses on the ground that respondents did not follow the proper procedures for requesting leave.[6]

Respondents sought review by the full MSPB. In a consolidated decision issued on November 10, 1983, the MSPB reversed the decisions of the four presiding officials (App., *infra,* 24a-31a). It first ruled that there were no specified procedures for requesting official time to represent one's union in collective bargaining (*id.* at 27a). Relying on the fact that the Secretary of Transportation had requested on August 1 that PATCO representatives be in

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[6] Each of the four decisions involved a large number of air traffic controllers and raised numerous issues that are not relevant here; we have reproduced only those portions of the opinions that pertain to this case (App., *infra,* 32a-64a).

Washington for collective bargaining, the MSPB then held that respondents were, at the various times at which they failed to report for work after 11:00 a.m. on August 5, 1981, engaged in representing PATCO in collective bargaining and were therefore not subject to dismissal for failing to report to work (*id.* at 27a-29a).

On May 11, 1984, the MSPB reopened the case and requested additional briefing (App., *infra,* 22a-23a).[7] On August 1, 1984, the MSPB issued a new decision vacating its earlier ruling and sustaining respondents' removal (*id.* at 14a-21a). The MSPB held that respondents were not entitled to official time under 5 U.S.C. 7131(a) for two reasons. First, it found that respondents were participants in the strike and that they would have stayed away from work even had they not been in Washington (App., *infra,* 18a-19a). Reasoning that Section 7131(a) only authorizes leave for persons who "otherwise would be in a duty status," it ruled that respondents did not qualify (App., *infra,* 18a-19a). Second, the MSPB held that respondents were not, at the times at which they failed to report, engaged in collective bargaining, and hence were not entitled to official leave under Section 7131(a) (App., *infra,* 19a). The MSPB took official notice of the fact that PATCO itself had acknowledged that the FAA had stated its unwillingness to bargain during a strike and had charged the FAA with an unfair labor practice for refusing to bargain after the strike had begun (*ibid.*). Noting that respondents were "claim[ing] an entitlement to official

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[7] In ordering rehearing, the MSPB indicated (App., *infra,* 22a-23a) that it wanted to reconsider its decision in light of this Court's *BATF* decision and in light of the FLRA General Counsel's determination that the FAA's duty to participate in collective bargaining had been suspended because of the PATCO strike. The MSPB stated (*id.* at 22a) that it was rehearing the case on its own motion and that it was denying the government's request to file a petition for reconsideration out-of-time.

leave for their role in negotiations which the union alleged were not being conducted" (*ibid.*), the MSPB ruled that the concept of collective bargaining did not include time spent "waiting to see if the agency could be compelled or coerced into once again dealing with the union" (*id.* at 19a-20a).[8]

4. Respondents sought review by the United States Court of Appeals for the Federal Circuit. On August 8, 1986, a panel of that court reversed the MSPB (App., *infra,* 1a-10a), holding that respondents were engaged in collective bargaining and that this conduct entitled them to official time under 5 U.S.C. 7131 and Article 8(1) of the FAA/PATCO collective bargaining agreement.[9] The court reasoned that although respondents "were not involved in formal (across the table) negotiations with the FAA" during the strike, "PATCO remained the collective bargaining representative until October 1981" (App., *infra,* 9a (footnote omitted)). The court noted (*id.* at 10a) that respondents had to ratify any proposed collective bargaining agreement before it could be submitted to the rank and file union members and that "[i]f [respondents]

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[8] In addition, the MSPB noted (App., *infra,* 17a) that the failure of respondents and the union to follow normal procedures for requesting leave was inconsistent with respondents' claim that they were on approved leave and was "more consistent with a finding that [respondents] left their duty stations when the strike was imminent, intending to withhold their services during the strike, should it occur, in concert with others."

[9] Article 8(1) provided that "Union officials who are elected or selected to serve in an official capacity as a representative of the Union shall be entitled to a leave of absence for their terms of office or appointment" (App., *infra,* 5a n.7). Notwithstanding its ruling that Section 7131 and Article 8(1) authorized respondents' actions, the court treated the statutory issue as the "core issue" (App., *infra,* 4a (footnote omitted)). The court apparently concluded that unless respondents met the requirements of Section 7131(a), then they were not serving "in an official capacity" as union representatives.

had gone back to their home bases, the Union would have been unable to settle the strike because the strike ratification mechanism would not have been available." Furthermore, the court reasoned, even though the FAA had indicated that it would not negotiate during a strike, "[respondents] met with interested representatives of both the executive branch and Congress in a futile attempt to end the strike" (*ibid.*). The court concluded that "[i]n these circumstances, it was clearly not the intent of Congress that the negotiators for the representative Union must go home and discontinue talks with FAA after the strike was called" (*ibid.*).[10]

The court subsequently denied the government's petition for rehearing and suggestion for rehearing en banc (App., *infra,* 12a, 13a).

REASONS FOR GRANTING THE PETITION

Congress has unequivocally banned strikes by federal employees, making participation in such a strike a criminal act and excluding unions and individuals who participate in such strikes from the very definitions of "labor organization" and "employee" and hence from the protection of federal labor relations law. The Federal Circuit nevertheless ruled that respondents, who chose not to report to work but to remain in Washington after the deadline announced by the President had passed, were entitled to official leave, because they were engaged in representing a labor organization in the negotiation of a collective bargaining agreement, even though (i) that union had called the illegal strike, (ii) both the employing

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[10] The court also said that since respondents were engaged in collective bargaining, it was "irrelevant" whether they would have reported to work had they not been involved in such activity (App., *infra,* 7a n.9).

agency and the Secretary of Transportation had clearly indicated that no negotiations would occur until the strike ended, and (iii) no negotiations in fact took place. That ruling was plain error.

The error is important. Although federal employee strikes are infrequent, they can have devastating effects, including the disruption of essential services. Striking is inherently a collective activity: each federal employee who, without proper excuse, fails to report to work during a strike contributes materially to the strike's effectiveness. By erroneously excusing four representatives of the union that called a highly visible illegal strike, the decision below obscures what should be a clear message to federal employees: when an illegal strike has been called, their sole duty under federal labor relations law is to report to work.[11]

1. Federal employees have long been prohibited from striking.[12] Under 5 U.S.C. 7311(3), a person who "participates in a strike, or asserts the right to strike, against the Government of the United States" may not "accept or hold a position in the Government of the United States."[13] Accepting or holding such a position in violation of Section 7311(3) is a criminal offense (18 U.S.C. 1918(3)).

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[11] If the court of appeals' decision is permitted to stand, respondents—leaders of the union that called the strike—will be entitled to be reinstated and will receive substantial awards of back-pay, estimated by the FAA to be approximately $250,000 per respondent before taxes and other set-offs.

[12] The first statutory ban on striking by federal employees was enacted in 1946 as a rider to an appropriations bill. Third Urgent Deficiency Appropriation Act, Pub. L. No. 79-419, § 201, 60 Stat. 268-269. That provision prohibited the payment of salaries or wages to anyone who engaged in a strike against the government.

[13] Section 7311(3) was originally enacted in a similar form in 1955. Pub. L. No. 84-330, § 1, 69 Stat. 624, formerly codified at 5 U.S.C. (Supp. III 1956) 118p.

Federal law also requires all government employees to take an oath that they will not strike against the government (5 U.S.C. 3333(a)).

In the Civil Service Reform Act, Congress made it clear that the strike has no legitimate place whatever in federal labor relations. First, it is an unfair labor practice for a federal employee union to call, participate in, or condone a strike (5 U.S.C. 7116(b)(7)), and the FLRA is required to decertify a union that willfully engages in such activity (5 U.S.C. 7120(f)). Even more fundamentally, the Act defines "labor organization" to exclude "an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike" (Section 7103(a)(4)(D)), and the Act defines "employee" to exclude "any person who participates in a strike in violation of section 7311 of this title" (Section 7103(a)(2)(v)). These statutory provisions deprive striking unions and individuals of any protection under federal labor relations law.[14]

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[14] The legislative history of Section 7103(a)(2)(v) underscores Congress's strong opposition to striking by public employees. That limitation on the term "employee" was originally introduced as an amendment by Congressman Rudd (124 Cong. Rec. 29189-29190 (1978)). In explaining the purpose of his amendment, Congressman Rudd indicated (*id.* at 29190) that it was designed to "remove any doubt" about Congress's intent with respect to strikes by federal employees by providing "in clear and unequivocal language that strikes against the Federal Government are illegal and punishable." He further stated that under his amendment, a striking employee "would no longer enjoy the protections and benefits of [the Act]" (*ibid.*). In discussing the evils of public sector strikes, he pointed out that such strikes "deprive the public of services for which there is no alternative source of supply" and that some of those services "are so critical that their disruption threatens the public well-being" (*ibid.*). He characterized such strikes as "nothing short of blackmail—the actions of a narrow-interest group holding public welfare hostage in order to achieve their own selfish ends" (*ibid.*).

2. The court of appeals should not have accepted respondent's argument that they were "representing an exclusive bargaining representative in the negotiation of a collective bargaining agreement" (5 U.S.C. 7131(a)), while (and because) they remained in Washington so that they could be readily available to negotiate if the illegal strike successfully coerced the government back to the bargaining table. First, there was no "negotiation": respondents knew that the government had made it clear that it would not negotiate until the strike ended, and no negotiation occurred in fact. Second, if respondents had any hope of negotiations, it was a hope that the illegal strike, called by the union they were representing, would bring negotiations about: failure to report for duty during an illegal strike cannot be excused by a hope that the strike will achieve its objective.

a. By definition, "collective bargaining" in the public sector requires "a *good-faith effort* to reach agreement" (5 U.S.C. 7103(a)(12) (emphasis added)). But public employee strikes are illegal efforts to put political pressure on the government by subjecting the public to hardship and inconvenience. See generally *United Federation of Postal Clerks* v. *Blount,* 325 F. Supp. 879, 884 (D.D.C.) (three judge court), aff'd mem., 404 U.S. 802 (1971).[15] Once PATCO had called such a strike, its representatives could not claim to be engaged in "good faith efforts" to negotiate the issues that gave rise to the strike. Unless and until the strike ended, "collective bargaining," as defined in the statute, was simply not possible.

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[15] As the FLRA explained in its decision decertifying PATCO (*FAA* v. *PATCO,* 7 F.L.R.A. at 60), "[b]y engaging in the strike, PATCO not only rejected the congressionally prescribed framework for collective bargaining in the Federal sector but also PATCO attempted to tear that framework apart and replace it with collective bargaining on PATCO's own terms in defiance of the public interest."

In any event, respondents had no reason to believe that negotiations would take place, and no negotiations did occur once the PATCO strike began. The FAA made it clear from the outset that it would not negotiate as long as the illegal strike continued (App., *infra,* 2a-3a, 9a n.11). Indeed, PATCO itself explicitly recognized that there were no negotiations once the strike commenced and filed an unfair labor practice charge with the FLRA challenging the FAA's refusal to negotiate during the strike (*id.* at 19a).[16] And respondents' own evidence forecloses any finding that they were engaged in collective bargaining after August 3, 1981.[17]

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[16] The FLRA refused to issue a complaint on that charge because the FAA had no duty to bargain during the strike (App., *infra,* 19a). See also *FAA* v. *PATCO,* 7 F.L.R.A. at 60 (recognizing that collective bargaining ended with the call to strike on August 3, 1981).

[17] At his evidentiary hearing, respondent Sedgwick testified that he attended no negotiations with the FAA during all of August, and he gave no explanation as to what he was doing after the strike began (J.S.A. 239-240) ("J.S.A." refers to the Joint Supplemental Appendix filed in the court of appeals). Respondent Winter similarly admitted at his hearing that he was not personally involved in face-to-face negotiations with FAA officials, athough he indicated that PATCO president Poli told him that negotiations were continuing (*id.* at 151). Respondent Fitzgerald did not testify at all. Only respondent Vaughn spelled out his own activities in any detail. Vaughn indicated that he met with members of Congress, members of the news media, a member of President Reagan's staff, and certain FAA officials (*id.* at 91-95, 100-103, 124-125). But Vaughn admitted that he participated in no negotiations with the FAA on or after August 3 (*id.* at 119).

Vaughn's informal discussions with congressional staff, executive officials, and the media do not constitute "the negotiation of a collective bargaining agreement" for purposes of Section 7131(a), since the latter activity is limited to "bargain[ing]" with designated "representative[s] of [t]he agency" (5 U.S.C. 7103(a)(12); see 5 U.S.C. 7131(a) ("The number of employees for whom official time is authorized * * * shall not exceed the number of individuals designated as representing the agency for such purpose.")). Similarly, respondents cannot be deemed to have engaged in collective bargaining on the theory that

b. The Federal Circuit's ruling that respondents were entitled to decide to stand by in Washington[18] against the possibility that negotiations would resume runs counter to the fundamental premise that for federal employees striking is a wholly illegal collective bargaining tactic. PATCO could have terminated the strike at any time. Instead, its representatives remained in Washington, and off the job, "waiting to see if the agency could be compelled or coerced into once again dealing with the union" (App., *infra,* 19a-20a), *i.e.,* in the hope that the strike would *succeed* in bringing the FAA to the bargaining table. Failure to report for duty during an illegal strike cannot be excused by the possibility that, if the strike achieves its objective, the employee will *then* have duties that will entitle him to official leave.

3. Although strikes by federal employees do not occur often, their consequences may be extremely serious. Congress has therefore made it exceedingly clear that when a strike occurs, the duty of each federal employee is to not participate in it. Not participating in a strike means reporting for work on schedule in the absence of a valid excuse, and the Federal Circuit has sustained the dismissals of more than 11,000 rank and file air traffic controllers who failed, without valid excuses, to report for their next on-duty shifts after the President's deadline. See *Anderson,* 735 F.2d at 538-539 (citing several cases).

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they were "standing by" and waiting for the strike to end. As the MSPB stated (App., *infra,* 19a-20a), "[n]o matter how expansively the concept of negotiating may be interpreted, we do not believe that it should be extended to cover the stand-by time at issue here during which, after the illegal strike began, the [respondents] were waiting to see if the agency could be compelled or coerced into once again dealing with the union."

[18] There is, of course, no small irony in the implication that, had respondents left Washington, they would not have been able to return with sufficient speed should negotiations commence.

The Federal Circuit's decision in this case that leaders of PATCO had a valid excuse, because they were waiting to see if the government would return to the bargaining table, is not only in ironic contrast with that court's proper rejection of excuses proffered by thousands of rank and file employees, it also seriously obscures the congressional message to federal employees. The logic of the decision is that federal employees may decline to report for work during an illegal strike if they have some hope that the success of the strike itself will vindicate them; that logic would seriously weaken the deterrent to participation in future federal employee strikes.[19]

[19] The present case does not create an inter-circuit conflict. Indeed, such a conflict could not arise in light of the exclusive jurisdiction over appeals from the MSPB vested in the Federal Circuit. 28 U.S.C. 1295(a)(9). Accordingly, an erroneous decision by the Federal Circuit on the issue in this case will govern all future cases raising similar issues unless and until it is corrected by that court or by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.[20]
Respectfully submitted.

CHARLES FRIED
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FEBRUARY 1987

[20] Since Congress's explicit ban on striking by federal employees is dispositive in this case, the Court may wish to consider summary reversal.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-1833
MSPB Docket Nos. SE075281F0271, AT075281F2497
PH075281F1084, DE075281F0642

DAVID A. FITZGERALD, ET AL., PETITIONERS,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, RESPONDENT.

DECIDED: August 8, 1986

Before RICH and DAVIS, *Circuit Judges*, and COWEN, *Senior Circuit Judge.*

DAVIS, *Circuit Judge.*

This appeal is from a reconsideration decision of the full Merit Systems Protection Board (MSPB or Board),[1] overturning an earlier full Board Opinion in this case, and ultimately sustaining the removal of the four petitioners by the Department of Transportation, Federal Aviation Administration (FAA), from their positions as air traffic controllers, for participating in the illegal nationwide Professional Association of Air Traffic Controllers (PATCO) strike in 1981 and being absent without leave during that period. We reverse because petitioners were neither strikers nor absent without leave for the duration of the

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[1] *Fitzgerald* v. *Department of Transportation*, MSPB No. SE075281F0271 (Aug. 1, 1984).

strike; rather, they were on authorized leave as members of PATCO's national negotiating team in Washington, D.C.

I.

The basic facts of the PATCO strike are set forth in *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), *cert. denied*, 105 S. Ct. 432 (1984). Each petitioner in this appeal was a regional representative of PATCO's national negotiating team.[2] PATCO policy required that a majority of the regional representatives approve a proposed collective bargaining agreement before it could be submitted to the full PATCO membership for ratification.

The record establishes, the earlier full Board decision found, and the Board's reconsideration decision did not challenge, that (1) the Secretary of Transportation requested the presence of the PATCO negotiating team in Washington, D.C. on August 1, 1981—the day negotiations reconvened; (2) each petitioner received a telephone call from Dennis Reardon, the chief spokesman for the negotiating team, and was directed to arrive in Washington, D.C. on August 2, 1981; (3) all had either been placed on leave for August 2, 1981, or not charged with AWOL on that date; (4) all either requested leave or relied on past practice in which PATCO at the national level would request leave through the FAA's national labor relations office; (5) petitioners always had received "time-off" without question whenever their attendance was requested at prior negotiation sessions; (6) although the FAA announced that on August 3, 1981, no further negotiations would be conducted (as long as the illegal

[2] Carl Vaughn was the eastern regional representative, Max Winter the central regional representative, William Sedgwick the southern regional representative, and David Fitzgerald the Pacific regional representative.

strike continued), petitioners remained in Washington, D.C. and actively pursued an end to the strike through discussions with FAA, other executive and Congressional representatives; and (7) PATCO in this instance did not follow its past practice of requesting official leave for the negotiating team (but the petitioners apparently did not know that PATCO did not do so).

The FAA charged and found each petitioner guilty of strike participation and absence without leave.[3] The controllers appealed their removals to the Board. The presiding officials ruled that the controllers had not followed the proper procedures to obtain official leave and that their absences were unauthorized. On appeal, the full Board, in a decision dated November 10, 1983, reversed the initial decisions sustaining the removals. The Board first noted that "the past practice of the agency was to grant leave to [petitioners] in accord with 5 U.S.C. § 7131(a), and that these [petitioners] were not required to conform to any specified procedure to obtain such leave." The Board next determined whether these individual controllers were in fact "representing PATCO in the negotiation of a collective bargaining agreement." In this respect, the Board stated that

> other than [one] affidavit, the agency presented no evidence in support of its contention that appellants were not authorized members of the negotiating team in August 1981. Nor did the agency rebut the appellants' hearsay evidence that FAA officials had required the team's presence in Washington because past arrangements were made by others, appellants had no reason to believe that leave was not authorized or that arrangements had not been made as they had

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[3] The FAA charges covered strike participation and absence during various days between August 3, 1981 and August 11, 1981.

> been in the past. Thus, the weight of the evidence supports a finding that appellants were authorized representatives of PATCO on the dates charged.

The Board concluded, in that decision, that petitioners were engaged in "the representation of a collective bargaining agreement, and that [they] successfully rebutted the *prima facie* case presented by the agency."

Thereafter that first decision was reconsidered *sua sponte* by the full Board after the Office of Personnel Management had belatedly sought rehearing. In its August 1, 1984 reconsideration decision,[4] the full Board sustained the removals. It held that the agency successfully established a *prima facie* case of striking and that, because petitioners had not shown that they otherwise would have been in a duty status (and not on strike), they were not entitled to leave for official time.

II.

The core issue[5] is whether petitioners fall within the grant of official time found in the relevant statute (5

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[4] In connection with its determination to reconsider the case, the Board requested that the parties submit briefs on the following issues:

> 1. In light of *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, 464 U.S. 89 (1983), can these appellants be considered employees who 'otherwise would be in a duty status' in accordance with 5 U.S.C. § 7131(a) during the periods in question, when they failed to return to work upon commencement of the strike?
>
> 2. In light of the FLRA General Counsel's determination . . . that the agency had not committed an unfair labor practice because its duty to bargain with the PATCO union was suspended after commencement of the strike, did the Board err as a matter of law in concluding that appellants should have been carried in 'official leave' status as members of the union negotiating team?

These additional briefs were filed, but there was no new hearing.

[5] We need not consider petitioners' preliminary argument that the full Board was without authority to reconsider its first decision.

U.S.C. § 7131). They assert that, on the dates charged, they were in Washington, D.C. negotiating a collective bargaining agreement as members of PATCO's national negotiating team and were therefore entitled to official leave pursuant to 5 U.S.C. § 7131(a),[6] and the terms of the then existing collective bargaining agreement.[7]

A *prima facie* case of striking is established when the agency shows that an employee was absent *without authorization* during a strike of general knowledge. *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477, 482 (Fed. Cir.), *cert. denied*, 105 S. Ct. 432 (1984). We hold, however, that these petitioners were on authorized leave for the dates charged, pursuant to 5 U.S.C. § 7131(a) and Article 8, § 1 of the then collective bargaining agreement.

The statute, § 7131(a), declares:

> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter *shall* be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of

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[6] Section 7131(a) of Title 5, United States Code, provides:

Official time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

[7] Article 8, section 1 of the FAA/PATCO collective bargaining agreement provided that "Union officials who are elected or selected to serve in an official capacity as a representative of the Union shall be entitled to a leave of absence for their terms of office or appointment.

> employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(Emphasis added.) This legislation expressly mandates that an employee shall be granted official time (during the hours that the employee would otherwise be entitled to salary) if engaged in the negotiation of a collective bargaining agreement on behalf of a union that is certified as an exclusive representative. As the Board held in its first final order, "[t]he mandatory language of the statute compels the authorization of administrative leave; thus, the agency is devoid of discretion in the granting of such leave to employees who meet the criteria of the statute."

This history of § 7131 supports this view. Before the enactment of the 1978 Civil Service Reform Act, grants of official time were governed by a series of executive orders. Some permitted bargaining on "official time" at the agencies' discretion (Exec. Order No. 10988); others placed a ceiling on such payments (Exec. Order No. 11616); and some totally prohibited bargaining on official time even at the agencies' discretion (Exec. Order No. 11491). The use of the mandatory language contained in the Civil Service Reform Act's grant of official time "must be viewed against this background of conflicting and inconsistent practices." *United States Department of Agriculture* v. *FLRA*, 691 F.2d 1242, 1251 (8th Cir. 1982) (Heaney, *J.*, dissenting), *cert. denied,* 464 U.S. 1007 (1983).

Moreover, the enacted language of § 7131 was derived from the House version of the Civil Service Reform Act. *See* H.R. Rep. No. 95-1403 (1978). In adopting the House wording, Congress rejected the Senate version, which provided official time only to the extent agreed upon by the negotiating parties. *See* S. Rep. No. 95-969, p.112 (1978). As the Supreme Court recognized in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 102 (1983)

(*BATF*), "Congress . . . adopted the section in its present form, concluding, in the words of one Congressman, that union negotiators 'should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities'." The Court also interpreted the statutory phrase "during the time the employee otherwise would be in a duty status" to mean that "employee negotiators [are] to be paid as if they were at work, whenever they bargain during hours they would otherwise be on duty." *Id.* at 91.[8] If the negotiating session took place during the time period that the employee was otherwise scheduled to work, the employee would be entitled to receive compensation for that period. Conversely, if these representational duties occurred (for instance) on a weekend when the employee was not scheduled to work as a controller, there would be no pay. Thus, if the employee was in fact engaged in proper representational activities, the only question evoked by the statutory phrase "during the time the employee would be in a duty status" is whether that employee would otherwise have been scheduled, in ordinary course, to be paid by his FAA facility.[9]

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[8] *See BATF*, 464 U.S. at 99, in which the Court noted that "[a]ccording to the House Committee that reported the bill containing § 7131, Congress used the term 'official time' to mean 'paid time'."

[9] The Board's reconsideration decision erred in holding that that statutory phrase called upon the Board to decide first whether the petitioners would have been on strike if they were not engaged in statutorily representational activities. That turns the statutory inquiry on its head. The only real question is whether the petitioners were engaged in statutory collective bargaining. If they were, they were entitled to official time except for days that they would not ordinarily have been scheduled to work as controllers. It is irrelevant whether they would have participated in the strike if they had not been engaged in statutory functions.

The agency's past practice (up to August 1981) on the grant of official time had been consistent. Regional representatives of PATCO's national regulatory team were never denied leave, and they were never required to follow set guidelines in obtaining official time. These four petitioners followed that general practice, as we have stated, and the full Board so held in its first decision. On reconsideration, the Board seemed to cast doubt on its prior holding that petitioners had received authorization to proceed to Washington, but we think that conclusion is overwhelmingly required by the evidence, including the past practice, the affidavit (from the PATCO president) that the Secretary of Transportation had insisted that the PATCO negotiating team come to Washington immediately (August 1, 1981), and the testimony that the Secretary's statement had been repeated by union officials to petitioners. That authorization to come to Washington was never cancelled.[10]

The remaining problem, as stated in the Board's first final decision, "is whether [petitioners] were, on the dates charged, representing PATCO in the negotiation of a collective bargaining agreement." First, did petitioner's represent PATCO in Washington? It is undisputed that they were official members of PATCO's national negotiating team at least through July 1981. On petitioners' status in August 1981, the affidavit of PATCO's Reardon stated that petitioners were part of the negotiating team during that month. Robert E. Poli, then president of PATCO, declared by affidavit that the Secretary of Transportation "insisted that the PATCO negotiating team be present in

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[10] The Board's reconsideration decision stated that the Secretary's insistence that petitioners come to Washington did not cover post-strike periods, but there is nothing at all in the record to support that inference—so long as petitioners were carrying on collective bargaining activities. We discuss, *infra*, the nature and characterization of petitioners' activities while in Washington.

Washington, D.C. immediately [August 1] to ratify any tentative settlement that may be reached." The agency did not rebut petitioners' contention that the Secretary of Transportation requested their presence in Washington, D.C. And, although the affidavit of Edward V. Curran (Director, Office of Labor Relations, FAA) said that negotiating sessions with the full PATCO team were not held during August 1981, he also declared that negotiations resumed July 31, 1981 between national representatives of PATCO and the FAA. Based on the record and the fact that the presence and participation of the national team was required before any tentative agreement could be presented to the rank and file, the Board's apparent decision (on reconsideration) that petitioners were not authorized representatives of PATCO, on the August dates charged in the removal proceedings, is not supported by substantial evidence.

The second and crucial issue is the nature of petitioners' role in Washington, D.C. during August 1981. The controllers admit that they were not involved in formal (across the table) negotiations with the FAA.[11] However, PATCO remained the collective bargaining representative until October 1981. If the strike had been settled in August, PATCO would have to be dealt with.[12] Collective bargaining is broadly defined by 5 U.S.C. § 7103(a)(12) as:

> the performance of the mutual obligations of the representative of the agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult

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[11] When the strike came, FAA announced that it would not formally deal with PATCO or any strikers. The General Counsel of the Federal Labor Relations Authority later refused to hold that this was an unfair labor practice on the part of FAA.

[12] The General Counsel's determination (fn. 11, *supra*) did not decertify PATCO.

> and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached. . . .

As regional representatives, petitioners had to ratify any proposed collective bargaining agreement before it could be submitted to the Union rank and file. If these controllers had gone back to their home bases, the Union would have been unable to settle the strike because the strike ratification mechanism would not have been available. (Petitioners had always been awarded official time for past negotiations during which they were present solely to ratify a tentative agreement.) Moreover, the time spent dealing informally with FAA, the executive branch, and Congress, cannot be considered mere "stand-by" time.[13] Although the agency had announced that it would not negotiate during the strike, petitioners met with interested representatives of both the executive branch and Congress in a futile attempt to end the strike. It cannot be discounted that PATCO was still the authorized collective bargaining representative of the controllers. In these circumstances, it was clearly not the intent of Congress that the negotiators for the representative Union must go home and discontinue talks with the FAA after the strike was called; and the broad wording of § 7103(a)(12) certainly permits the construction that petitioners' activities in August 1981 were part of ongoing collective bargaining for which they were entitled to "official time" and authorized leave.

REVERSED.

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[13] In the reconsideration decision, the Board stated:

> No matter how expansively the concept of negotiation may be interpreted, we do not believe that it should be intended to cover the stand-by time at issue here during which after the illegal strike began, the [petitioners] were waiting to see if the agency would be compelled or coerced into once again dealing with the Union.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-1833
MSPB Docket Nos. SE075281F0271, AT075281F2497
PH075281F1084, DE075281F0642

DAVID A. FITZGERALD, ET AL., PETITIONERS,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, RESPONDENT.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). SE075281F0271, AT075281F2497 PH075281F1084, DE075281F0642. This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: REVERSED

ENTERED BY ORDER OF
THE COURT

/s/ FRANCIS X. GINDHART
Francis X. Gindhart, *Clerk*

DATED Aug. 8, 1986
ISSUED AS A MANDATE: October 16, 1986
COSTS: Against, Respondent.
PRINTING $564.67
TOTAL $564.67

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-1833

DAVID A. FITZGERALD, ET AL., PETITIONERS,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, RESPONDENT.

ORDER

Before RICH and DAVIS, *Circuit Judges*, and COWEN, *Senior Circuit Judge.*

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

/s/ FRANCIS X. GINDHART
Francis X. Gindhart, *Clerk*

10/3/86
Date

cc: Mr. Richard J. Leighton
Ms. Sandra P. Spooner, DOJ

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-1833

DAVID A. FITZGERALD, ET AL., PETITIONERS,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, RESPONDENT.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT

/s/ FRANCIS X. GINDHART
Francis X. Gindhart, *Clerk*

10/16/86
Date

cc: Mr. Richard J. Leighton
Ms. Sandra P. Spooner, DOJ

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket No. SE075281F0271

DAVID A. FITZGERALD, ET AL., APPELLANT,

v.

DEPARTMENT OF TRANSPORTATION, AGENCY.

[Date: Aug. 1, 1984]

OPINION AND ORDER

Appellants David A. Fitzgerald, William Sedgwick, Carl Vaughn and Mark K. Winter were removed by the Federal Aviation Administration (FAA) from their positions as air traffic controllers. These actions were taken because of their alleged participation in a nationwide strike, called by the Professional Association of Air Traffic Controllers (PATCO), which began on August 3, 1981. The appellants were also charged with AWOL for the same absences from their duty stations. Appellants were members of the union's nationwide negotiating team.[1]

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[1] The appellants raised similar claims which we consolidated for expeditious adjudication. 5 C.F.R. § 1201.36. Appellant Fitzgerald was included among the appellants covered by the initial decision in *Robert Boyd* v. *Department of Transportation,* Docket No. SE075281F0263 (January 26, 1983). Appellant William Sedgwick was included among the appellants covered by the initial decision in *Gerald L. Agolini* v. *Department of Transportation,* AT075281F2351 (January 14, 1983). Appellant Carl Vaughn was among the appellants subject to the initial decision in *Richard E. Brenner* v. *Department of Transportation,* Docket No. PH075281F1024 (February 1, 1983).

Despite initial decisions upholding these removals, we reversed the agency actions in an opinion dated November 10, 1983. However, we subsequently reopened this case on our own motion and invited additional briefing. Having now reexamined the case, we conclude that our original opinion was in error.

In that opinion, we did not adequately consider whether the appellants were AWOL or on strike because we concluded that 5 U.S.C. § 7131(a) required a finding that the appellants were on official time during the period of the strike. That statute provides:

> § 7131. Official Time
>
> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

The recent Supreme Court decision in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 104 S. Ct. 439 (1983), emphasizes the importance of that statute's requirement that official time is to be granted only to

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Appellant Max K. Winter was among the appellants covered by the initial decision in *Gary J. Ayers* v. *Department of Transportation*, and *Michael M. Harp* v. *Department of Transportation*, Docket Nos. DE075281F0581 and DE075281F0602 (February 1, 1983). The agency charged appellants with the following AWOL and strike violations: appellant Fitzgerald, beginning at 2 p.m., August 3, 1981 through August 6, 1981: appellant Sedgwick, beginning at 6:55 a.m., August 3, 1981 through August 11, 1981; appellant Vaughn, beginning at 3 p.m., August 3, 1981 through August 6, 1981; and appellant Winter, beginning at 7 a.m., August 3, 1981 through August 9, 1981.

employees who would otherwise have been in a duty status. We did not consider that limitation in our earlier decision. If appellants were actually AWOL or on strike, they would not have been eligible, under 5 U.S.C. § 7131(a), for official leave because they would not, without that leave, have otherwise been in a duty status.

On that issue, we find the agency did establish a *prima facie* case that the appellants were on strike. The agency proved the appellants' unauthorized absence from their duty stations during a strike, the existence of which was a matter of general knowledge. *Schapansky* v. *Department of Transportation,* No. 83-663 (Fed. Cir. May 18, 1984). The appropriateness of applying this traditional method of establishing a *prima facie* case in this proceeding is buttressed by the appellants' role as national negotiators for PATCO, the exclusive representative which was subsequently decertified for wilfully and intentionally calling the strike involved here. *PATCO (FAA),* 7 FLRA 34 (1981). It would be illogical for us to require the agency to establish strike participation on the part of these appellants by a greater degree of proof than we generally required it to introduce in the other 11,000 appeals involving controllers who were not union negotiators. The status of these appellants as negotiators is not a bar to the agency's attempt to prove their participation in the illegal strike. The relevance of that status, if any, goes to the appellants' ability to rebut the agency's case.

The appellants did not rebut the agency's case. The records in these cases reveal that appellants Fitzgerald, Winter and Sedgwick did not claim that their leaves, during the strike period, were officially authorized. Moreover, the records reveal that appellant Winter was specifically contacted by his supervisor on August 2, 1981, the day before the strike began, and instructed to report for duty. *Ayers, supra,* Hearing Transcript (Tr.) at 531. It also reveals that Winter did not at that time inform his

supervisor that he would not report for duty and that, instead, he immediately intended to travel to Washington to be with the union leadership. *Ayers,* Tr. at 532 and 538, 539. Only appellant Vaughn claimed to have received prior approval of his absences from duty during the strike and, in his case, the presiding official, after properly weighing the evidence presented, concluded that Vaughn's absences were not, in fact, so authorized.

The appellants' main contention is that they were in an informally approved leave status during the strike. In that regard, they relied upon the agency's past practice of granting leave to members of the negotiating team without requiring them to seek and obtain prior authorization directly from their immediate supervisors. This reliance, however, is unavailing. It is undisputed that the procedures which were usually followed by each of the appellants and by the union to obtain official leave status for negotiators were disregarded here. In fact, appellant Sedgwick testified that he failed to follow those procedures at the union president's request in order to keep the trip secret. While, the affidavit of Dennis Reardon, the responsible union official, indicated that the lack of prior notification was occasioned by the press of business, it is admitted that when each of the appellants left his duty station to travel to Washington in early August, 1981, the union failed to notify the agency, as it normally did, that they should be placed in a leave status. These failures to follow normal procedures for acquiring official time are inconsistent with the appellants' claim that they believed they were in an informally approved leave status. Such disregard of normal procedures by appellants and the union is more consistent with a finding that the appellants left their duty stations when the strike was imminent, intending to withhold their services during the strike, should it occur, in concert with others.

The appellants, however, rely upon a statement attributed to the Secretary of the Department to bolster their claim that they were in an informally approved leave status. The affidavit of the union president states that Secretary Lewis insisted that the negotiating team be in Washington immediately prior to the strike since any tentative contract had to be accepted by a majority of that team before it could be submitted to the union membership for ratification. *Brenner* v. *Department of Transportation, supra*, Appellants' Ex. 8. In our earlier opinion, we accepted that unrebutted hearsay evidence as true. In addition, there was testimony that the statement attributed to the Secretary was repeated by union officials to the appellants. Since they had been told that FAA officials requested their presence, appellants might have believed, despite their failure to follow normal procedures, that they were entitled to be considered on official time during the period when negotiations were being conducted in an attempt to avert the impending strike. However, nothing in that hearsay statement attributed to the Secretary directly speaks to post-strike negotiating activities. Therefore, once the strike began, the appellants could not rely upon the Secretary's earlier desire to have them in Washington to support a claim that their continued absences from duty had been authorized by the Secretary and that they were, thus, in an informally approved leave status.

The appellants also contend that, even without official or unofficial authorization, their absences from their duty stations during the strike should be excused because the language of 5 U.S.C. § 7131(a) mandates the authorization of official time status to employees representing an exclusive representative in the negotiation of a collective bargaining agreement. We cannot agree with that contention in this case. If the appellants were actually on strike while they were negotiating, they would not be entitled to official leave. Title 5 U.S.C. § 7131(a) does not turn the

act of conducting negotiations into official duty. Instead, it confers the right to salary, during these negotiations, to an employee who otherwise would be in a duty status. As the Supreme Court said, the qualifying language of that statute "strongly suggests that union negotiators engaged in collective bargaining are not considered *in* a duty status. . . ." *Bureau of Alcohol, Tobacco and Firearms, supra*, 104 S. Ct. at 448. Moreover, "Congress did not provide that employees engaged in collective bargaining are acting in their 'official capacity,' 'on the job,' or in a 'duty status' " *Id.* Therefore, for appellants to have established a legal right to be considered on official time, they would also have to have otherwise been in a duty status, a status they could not claim if they were striking.

In addition, and alternatively, we find that we were incorrect in our original determination that the appellants were representing an exclusive representative in the negotiation of a collective bargaining agreement during the period of the strike. We take official notice of the fact that PATCO charged the agency with an unfair labor practice for refusing to bargain during the existence of the strike. *PATCO* v. *FAA*, FLRA Case No. 3-CA-2729 (Amended Charge dated August 8, 1981). In its allegation, the union asserted that the agency refused to meet and negotiate with PATCO and that the agency announced that the only people "we will deal with are people on the job, working as traffic controllers." *Id.* It is interesting to note that the FLRA refused to issue a complaint, based upon that charge, concluding, instead, that there was no duty to negotiate during the illegal strike. (General Counsel's Decision Denying Appeal, Case No. 3-CA-2729 dated September 21, 1981.) However, for the purposes of this case, the important fact is that the appellants claim an entitlement to official leave for their role in negotiations which the union alleged were not being conducted. No matter how expansively the concept of negotiating may be

interpreted, we do not believe that it should be extended to cover the stand-by time at issue here during which, after the illegal strike began, the appellants were waiting to see if the agency could be compelled or coerced into once again dealing with the union.

Finally, relying upon *Letenyei* v. *Department of Transportation, FAA,* No. 83-1174 (Fed. Cir. May 18, 1984) and *Trick* v. *FAA,* No. DC0752811F1144 (MSPB Dec. 17, 1981), appellants assert they had a good faith belief in their entitlement to leave under 5 U.S.C. § 7131(a) and that this good faith belief precludes a finding of strike participation.[2] We are not persuaded by this argument. We find that their absences were the direct result of their support for and involvement in the illegal strike. *Letenyei* is inapplicable since its holding relates to the employee's claim that he was not acting in concert with others, a claim these appellants cannot make. They each went to Washington to assist PATCO in attempting to negotiate a new agreement after the union had announced its intention, if such negotiations failed, to call the illegal strike, and remained there after it had done so. Moreover, *Trick* is inapplicable because the language therefrom upon which appellants rely related to a belief that there was an approved leave in existence. Here, there was no such approved leave. The appellants' claimed belief that their leave would have to be approved was not one on which they were entitled to rely. The appellants had not sought or received prior approval of their leave status. An illegal strike was being conducted and management had declared that it would not negotiate with PATCO during the strike.

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[2] Appellants' twenty-four page filing in response to our request for briefs contained more arguments than we have mentioned in this opinion. *See Appellants' Objection and Brief Responding to the Board's Order Reopening Case on Its Own Motion.* While we have addressed only the appellants' relevant major contentions, we have carefully considered all of the arguments contained in their filing.

Under these circumstances, appellants might hope, but could not reasonably believe, that 5 U.S.C. § 7131(a) entitled them to official time.

Consequently, we find that the agency proved by a preponderance of the evidence that appellants participated in a strike. In addition, we find that the agency-imposed penalty of removal for striking is reasonable. *Schapansky* v. *Department of Transportation,* MSPB Docket No. DA075281F1130 (October 28, 1982) (the nature and gravity of striking aganist the government justifies an employee's removal despite the presence of mitigating factors).

Accordingly, the agency's actions removing appellants is sustained.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c). Appellants are hereby notified of their right to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the Court no later than thirty days after appellant's receipt of this order.

FOR THE BOARD:

Washington, D.C.

/s/ DENNIS M. DEVANEY
Dennis M. Devaney
Member

APPENDIX E

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket No. SE075281F0271

DAVID A. FITZGERALD, ET AL.[1]
APPELLANTS,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, AGENCY.

ORDER

By letter dated January 17, 1984, the Director of the Office of Personnel Management (Director) requested the Board to reopen and reconsider on our own motion the above-referenced case or, in the alternative, to grant the Director leave to file a petition for reconsideration out of time. The Board DENIES the Director's request to file a petition for reconsideration out of time. However, the Board REOPENS and RECONSIDERS this case on its own motion pursuant to 5 C.F.R. § 1201.117. *See Dawson* v. *Merit Systems Protection Board,* 712 F.2d 264 (7th Cir. 1983); *Bookman* v. *United States,* 453 F.2d 1263 (Ct. Cl. 1972). Because the Board is reopening and reconsidering the instant case on its own motion, the Board hereby stays the corrective action in its November 10, 1983 decision.

[1] This Order relates to appellants David A. Fitzgerald, William Sedgwick, Carl Vaughn and Max K. Winter. MSPB Docket Nos. SE075281F0271, AT075281F2497, PH075281F1084, DE075281F0642, respectively.

The Board requests that the parties and the Director submit briefs on the following issues:

1. In light of *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, 52 U.S.L.W. 4013 (Nov. 29, 1983), can these appellants be considered employees who "otherwise would be in a duty status" in accordance with 5 U.S.C. § 7131(a) during the periods in question, when they failed to return to work upon commencement of the strike?

2. In light of the FLRA General Counsel's determination (Case No. 3-CA-2729) that the agency had not committed an unfair labor practice because its duty to bargain with the PATCO union was suspended after commencement of the strike, did the Board err as a matter of law in concluding that appellants should have been carried in "official leave" status as members of the union negotiating team?

Each party's brief is due twenty days after receipt of this Order and is limited to the above issues.

FOR THE BOARD:

May 11 1984
Date

/s/ ROBERT E. TAYLOR
Robert E. Taylor
Secretary

APPENDIX F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket Number SE075281F0271

DAVID A. FITZGERALD, ET AL.[1]
APPELLANTS,

v.

DEPARTMENT OF TRANSPORTATION AGENCY.

OPINION AND ORDER

Appellants have petitioned for review of the initial decisions sustaining their removals from their positions as Air Traffic Control Specialists.[2] The agency charges were

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[1] This Opinion and Order relates to the appeals of David A. Fitzgerald, William Sedgwick, Carl Vaughn, and Max K. Winter. The appellants composed the union national negotiating team and they therefore raise similar claims which we consolidate for expeditious adjudication. 5 C.F.R. § 1201.36. Appellant Fitzgerald was included among the appellants covered by the initial decision, *Robert Boyd et al.*, Docket No. SE075281F0263, dated January 26, 1983. Appellant William Sedgwick, Docket No. AT075281F2497, was included among the appellants covered by the initial decision, *Gerald L. Agolini, et al.*, Docket No. AT075281F2351, dated January 14, 1983. Appellant Carl Vaughn, Docket No. PH075281F1084 was among the appellants subject to the initial decision, *Richard E. Brenner, et al.*, Docket No. PH075281F1024 (February 1, 1983). Appellant Max K. Winter, Docket No. DE075281F0642 was among the appellants covered by the initial decision *Gary J. Ayers, et al.* and *Michael M. Harp, et al.*, Docket Nos. DE075281F0581 and DE075281F0602 (February 1, 1983).

[2] Appellant Fitzgerald was based at Anchorage, Alaska; appellant Sedgwick at Jacksonville, Florida; appellant Vaughn at Pittsburgh, Pennsylvania, and appellant Winter at Denver, Colorado.

striking against the government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918 and unauthorized absence (AWOL) beginning on August 3, 1981.[3]

Appellants' petitions for review contend that on the dates charged, they were in Washington, D.C. involved in the negotiation of a collective bargaining agreement as members of the Professional Air Traffic Controllers Organization (PATCO) National Negotiating Team, and that they therefore were entitled to administrative leave pursuant to 5 U.S.C. § 7131(a). Thus they argue that the presiding officials erred in sustaining the charges of AWOL and illegal striking. The Board hereby GRANTS appellants' petitions for review pursuant to 5 U.S.C. § 7701(e)(1).

DISCUSSION

Section 7131(a) of Title 5 of the United States Code provides:

> § 7131. Official time
>
> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

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[3] The agency charged appellants with both violations as follows: appellant Fitzgerald beginning at 2 p.m., August 3, 1981 through August 6, 1981; appellant Sedgwick, beginning at 6:55 a.m., August 3, 1981 through August 11, 1981; appellant Vaughn, beginning at 3 p.m., August 3, 1981 through August 6, 1981; and appellant Winter, beginning at 7 a.m., August 3, 1981 through August 9, 1981.

It is undisputed that an employee negotiating on behalf of a union is entitled to official time. *Florida National Guard* v. *Federal Labor Relations Authority*, 699 F.2d 1082, 1086 (11th Cir. 1983), *petition for cert. filed on other grounds*, 51 U.S.L.W. 3485 (U.S. Dec. 16, 1982) (No. 82-1021). The mandatory language of the statute compels the authorization of administrative leave; thus, the agency is devoid of discretion in the granting of such leave to employees who meet the criteria of the statute.

Testimony in each hearing supported past practice conforming to this entitlement. Appellant Winter testified that customarily he told the facility chief that he would be attending negotiating sessions in Washington, D.C., but that arrangements were made between the Federal Aviation Administration and PATCO in Washington and that the FAA would in turn notify the facility. *Ayers* Hearing Transcript (H.T.) at 456. The area manager at Winter's facility testified that the agency "had an obligation to give them time off when they needed it for certain meetings." *Id.* at 532.

Appellant Vaughn testified that he informed his supervisor that he had to be in Washington. *Brenner* H.T. at 481, 495. The air traffic manager at Vaughn's facility testified that Vaughn had been carried in a paid duty status when serving as a member of the negotiating team, that the agency had paid his transportation to Washington and that normal procedure was that the FAA regional office or the labor relations branch would call the facility. As manager, he would then inform Vaughn's supervisor of Vaughn's absence from the facility. *Id.* at 42-43.

Appellant Sedgwick testified that he was always scheduled so that he could leave on a "minute's notice" and that it was unnecessary to notify the facility chief in advance. *Agolini* H.T. at 177. He further testified that the FAA paid for his flights to Washington and that he was on administrative leave at those times. *Id.* at 176.

Sedgwick's facility chief testified that Sedgwick informed him of travel dates and that he would obtain concurrence or advance notification from the labor section of the regional office. *Id.* at 27. Sedgwick's chief stated that he would then process a transportation request and later, appellant's travel vouchers. *Id.*

Appellant Fitzgerald did not testify at his hearing. Although the manager of the labor relations branch in the Alaska Region testified that an employee is not allowed to leave a duty status without the prior approval of his supervisor, and that appellant's duties as part of the negotiating team did not excuse this absence, he also stated that it was the responsibility of the FAA negotiating team to contact the labor relations branches and that the personnel in those branches in turn made arrangements with the facility. *Boyd* H.T. at 177, 176.

In sum, the evidence supports a finding that the past practice of the agency was to grant leave to these members of the negotiating team in accordance with 5 U.S.C. § 7131(a), and that these appellants were not required to conform to any specified procedures to obtain such leave.

The question therefore remaining to be resolved is whether appellants were, on the dates charged, representing PATCO in the negotiation of a collective bargaining agreement. It is undisputed that appellants formed the PATCO negotiating team until at least July, 1981. Presiding officials in the initial decisions of Fitzgerald, Sedgwick, and Winter noted, however, that identical affidavits submitted by Edward Curran, Director of the Office of Labor Relations for the FAA, states that appellants were not authorized participants in the negotiations which resumed on July 31, 1981, although they had met as the negotiating team prior to that date.

The affidavit of Dennis Reardon, Chief Spokesman for the PATCO negotiating team, was introduced as evidence in the records of Fitzgerald, Vaughn, and Winter. Reardon

stated that all of the appellants were members of the negotiating team in August, 1981, that any tentative contract had to be accepted by a majority of the negotiating team before it could have been submitted to the membership for ratification, and that, therefore, it was necessary for the team to be in Washington. He further affirmed that negotiations reconvened on August 1, 1982 (sic) and that he had failed to notify the FAA of the decision to recall the team members as he had done in the past.

An affidavit of Robert Poli, then President of PATCO, in the Vaughn and Winter records repeated most of the statements made by Reardon. Poli, however, added that the Secretary of the Department of Transportation, Drew Lewis, insisted that the negotiating team be present in Washington when the negotiations reconvened on August 1, 1981.

Appellants Sedgwick, Vaughn, and Winter all testified that they were in Washington serving on the negotiating team on the days they were charged by the agency. *Agolini* H.T. at 184-85, 204; *Brenner* H.T. at 496-97; *Ayers* H.T. at 457-60. Appellants also testified that they were told that Secretary Lewis wanted them in Washington. *Angolini* H.T. at 182; *Brenner* H.T. at 504-05; *Ayers* H.T. at 458-59. Apellant Vaughn testified that the FAA knew that he was in Washington because he met with several FAA officials. *Brenner* H.T. at 506-08.

The agency evidence and much of the appellant's evidence is hearsay. Hearsay evidence is admissible in administrative proceedings; but whether it is sufficient to support an agency adverse action must be weighed in light of the totality of the record, and by comparing its credibility against that of the contrary evidence. *Green* v. *United States Postal Service*, 3 MSPB 403-04 (1980). Although due deference must be given to the credibility assessments of the presiding officials, the Board is free to substitute its own determinations of fact for those of the

presiding officials, giving the presiding officials' findings only so much weight as may be warranted by the record, *Weaver* v. *Department of the Navy,* 2 MSPB 297, 298 (1980).

Other than the Curran affidavit, the agency presented no evidence in support of its contention that appellants were not authorized members of the negotiating team in August 1981. Nor did the agency rebut the appellants' hearsay evidence that FAA officials had requested the team's presence in Washington. *See Boyd*, H.T. at 176; *Agolini* H.T. at 25-6; *Brenner* H.T. at 41; *Ayers* H.T. at 532. Because past arrangements were made by others, appellants had no reason to believe that leave was not authorized or that arrangements had not been made as they had been in the past. Thus, the weight of the evidence supports a finding that appellants were authorized representatives of PATCO on the dates charged.

Finally, in order to find that 5 U.S.C. § 7131(a) applies to appellants, it must be determined that they were engaged in the negotiation of a collective bargaining agreement. Collective bargaining is defined by 5 U.S.C. § 7103(a)(12) as:

> the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

Appellants admit that they attended no face-to-face negotiating sessions. *Agolini* H.T. at 198-99; *Brenner* H.T. at 524; *Ayers* H.T. at 459. However, the evidence shows that the negotiating team's role was approval of a contract prior to its submission to the entire union membership. *See* Reardon affidavit; Poli affidavit; *Agolini* H.T. at 185, 204; *Brenner* H.T. at 496, 499, 503; *Ayers* H.T. at 459, 460.

The legislative history of § 7131(a) discloses that it was the intent of Congress that the entitlement of official time would include all negotiations in the collective bargaining procedure. Section 7131(a) of Title 5 is identical to § 7132(a) of the Bill (H.R. 11280) reported to the House Post Office and Civil Service Committee. *See* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 288 (1978). Congress rejected the language in § 7232 of the Bill (S. 2640) reported to the Senate by the Senate Government Affairs Committee which sought to maintain restrictions on the use of official time for negotiation by employees representing unions. The rejected language permitted official time only to the extent agreed upon by negotiating parties, as established in Exec. Order 11491, 3 C.F.R. 1966-1970 Comp. 861 (1969).

Thus, we find that negotiating a collective bargaining agreement encompasses the roles of appellants in this instance and that appellants were entitled to administrative leave under 5 U.S.C. § 7131(a) for the days on which they were charged. Therefore, the appellants rebutted the agency's prima facie cases of strike participation and AWOL, and the agency's charges cannot be sustained. *See Schapansky* v. *Department of Transportation*, MSPB Docket No. DA075281F1130 at 6 n.2 (October 28, 1982).

Accordingly, the *Boyd, et al.* initial decision is REVERSED with respect to David Fitzgerald, the *Agolini et al.* initial decision is REVERSED with respect to William Sedgwick, the *Brenner, et al.* initial decision is

REVERSED with respect to Carl Vaughn, and the *Ayers and Harp. et al.* initial decision is REVERSED with respect to Max Winter.

The agency is ORDERED to cancel the removals of appellants Fitzgerald, Sedgwick, Vaughn, and Winter.

Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the respective Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c).

Each appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

For The Board:

Nov 10 1983	/s/ ROBERT E. TAYLOR
Date	Robert E. Taylor *Secretary*

Washington, D.C.

Attachment: Statement of the Board's policy on service of its opinions and orders. [Not included in Appendix]

APPENDIX G

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

Initial Decision Number: PH075281F1084 (Vaughn)

RICHARD E. BRENNER, ET AL.

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Date: February 1, 1983

[Relevant excerpts relating to respondent Carl Vaughn]

INTRODUCTION

These are appeals from removal actions. All of the appellants * * * with the exception of August A. Jeske, Jr., were terminated from positions as Air Traffic Control Specialists at the Greater Pittsburgh Tower, Pittsburgh, Pennsylvania. * * * In each of these cases the agency cited as reasons for the proposed removal, appellants' alleged participation in an illegal strike and an alleged offense of unauthorized absence.

At appellants' request a hearing was held with respect to this matter on November 16, 17 and 18, 1982.

JURISDICTION

An employee may appeal to the Merit Systems Protection Board from any action which is made appealable to the Board under any law, rule, or regulation, 5 U.S.C.

Section 7701(a). The law provides that an employee in the competitive service who is not serving a probationary period may appeal an action removing him or her from the Federal service, 5 U.S.C. Sections 7511(a)(1)(A), 7512(1) and 7513(d). The record shows that the appellants were employees in the competitive service, that they were not serving in probationary periods, and that they were removed from their positions with the Department of Transportation. Accordingly, I find that these appeals are acceptable for adjudication.

ANALYSIS AND FINDINGS

In order to have its removal decision sustained, an agency has the burden of establishing the reason for the action, by a preponderance of the evidence, 5 U.S.C. Section 7701(c)(1)(B). This is defined as:

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

5 C.F.R. 1201.56(c)(2).

All of the appellants received advance notices which were, with the exception of times and dates, identical to each other:

> *Reason 1*: Violation of 5 U.S.C. 7311, which states in pertinent part, "An individual may not accept or hold a position in the Government of the United States . . . if he . . . participates in a strike against the Government of the United States . . ."; and 18 U.S.C. 1918, which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.
>
> *Specification*: Beginning at approximately 7 a.m. EDT, on August 3, 1981, a nationwide strike by air traffic controllers occurred. Beginning at

on August , 1981 when you failed to report for duty, until the present, you participated in a strike against the United States Government.

Reason 2: Unauthorized Absence.

Specification: Beginning first at the to shift on August , 1981, you failed to report for your scheduled tour of duty. On August , 1981, you were sent a telegram that an illegal strike was in progress, and that you must return to duty for your regularly scheduled shift. You failed to return to duty, and instead remained absent without authorization.

Four of the appellants asserted defenses revolving around allegations that they were on approved leave at the time they were accused of being on strike and absent without authorization. With respect to the other thirteen, the factual pattern is so similar, one issue excepted, that a joint analysis of their cases is warranted. The issue in question, whether the absence of four of them is excusable due to confusion fostered by the agency, will be analyzed after the matter of the absences themselves are analyzed.

The agency's princial witness against all appellants but Jeske was Peter W. Bernhard, the Chief Air Traffic Controller at the Greater Pittsburgh Airport. Bernhard explained in some detail as to how the work schedule at the Greater Pittsburgh Tower was set up, stating that it was based upon a team concept, and that each individual controller could determine what his work shifts would be for the month of August 1981, by looking at the master schedule. The schedule for August 1981 had been disseminated two months in advance. An employee was obligated to sign in on a Personnel Log for each shift that he was supposed to report for work. If an employee failed to report for work, was not on approved leave, and offered no reason for his absence, he would be carried as Absent Without Leave on his Time and Attendance Cards.

Paul Spanko, the Tower Chief at the Allegheny Tower, testified that the same system of composing schedules, signing in for shifts, and recording absences was in effect at the Allegheny facility. Spanko further testified that appellant Jeske did not report for work for any of his scheduled shifts during the week of August 3, 1981, was not on approved leave, and did not contact the agency to offer any excuses to explain his absences. Bernhard offered similar testimony with respect to appellants Brenner, Mastraieni, Flaherty, Dissen, Kaltenbaugh, Welsh, West, Wintermeyer, Novitsky, Schultz, Dilla and Brickner; i.e., that all of them were absent from all of their scheduled shifts during the week of August 3, 1981, that none of them were on approved leave, and that none of them contacted the agency to offer any explanation for their absences. None of the appellants presented any evidence. * * * Accordingly, I find that the agency has demonstrated, by a preponderance of the evidence, that appellants Brenner, Mastraieni, Flaherty, Dissen, Kattenbaugh, Welsh, West, Wintermyer, Novitsky, Schultz, Dilla, Brickner and Jeske were Absent Without Authorization on the dates charged.

Four of the appellants claim they were on some form of approved leave at the time of the strike, and allege that since their absences were approved and their services not due, the charges of Unauthorized Absence and striking cannot be sustained against them. The agency had notified all controllers by means of Pittsburgh Order 7210.6, that all annual leave automatically be cancelled in the event of a strike. Appellants claim that according to Article 28, Section 1 of the agreement between PATCO and the agency, leave could not be cancelled except in the case of an operational emergency, and that since the operational emergency did not occur until after the strike began, a notification prior to that time was contrary to the terms of the contract. Appellants argue that each should have been

notified individually of the leave cancellation. Moreover, some of the appellants allege that their initialling of PIT 07210.6, did not mean that they had read it or understood it.

I find this latter argument to be specious. Testimony was given that the initialling of such a communication by a controller was a declaration that they had read and understood it. A controller having so initialled this Order will be presumed by me to have read and understood it. Any other finding by me on this issue would constitute a determination that an individual had made a false representation with a consequent impact on his credibility. With respect to the issue of whether the agency's policy was contrary to the collective bargaining agreement, I note that a strike in which the vast majority of controllers absent themselves is, by any definition, an operational emergency; therefore, both the agency and the appellant knew that if there were a strike there would be a *de facto* operational emergency. All the appellants, with the possible exception of Stumpf, certainly knew of the strike, and, therefore, of the operational emergency. All had been put on notice that their leave was cancelled as soon as there was a strike. Even assuming, *arguendo*, that the agency had not complied with the collective bargaining agreement, the appellants' avenue of redress was not to disobey the agency's directive, but to have the dispute resolved through the grievance procedures set up by Article 7 of the same agreement.

* * * * *

Carl Vaughn was, like Lane, Snyder and Stumpf, absent for his assigned shifts during the week of August 3, 1981. Like them, he claims to have been on approved leave during this week. Vaughn is the PATCO representative for the Eastern Region on the national negotiating team. He claims that he requested leave from a supervisor who approved it, and that he was therefore on approved leave

during the time he was on strike. However, as with the other individuals alleging approved leave, appellant Vaughn never raised this issue during either the agency removal process, or, during his initial appeal to the Board. Moreover, in his answers to the Interrogatories, Vaughn indicated he was on leave only on August 2, 1981, and that he was scheduled for duty on August 3, 4, and 5, 1981. Furthermore, there is ample evidence that neither Vaughn nor PATCO followed the regular procedures required to release him from duty, in that neither Bernhard nor the Region was informed that he was required. PATCO admitted that they did not notify the agency of its decision to call in the negotiators. Vaughn claims that he spent the next several months in Washington attempting to resolve the strike situation. While I have no doubt as to this representation, I find that all of his absences after August 2, 1981, for whatever purpose, were without authorization, and, therefore the agency has demonstrated, by a preponderance of the evidence that he was absent without authorization on the dates indicated.

In sum, I have found that the agency has demonstrated by a preponderance of the evidence that all of the appellants were absent without authorization on the days indicated.

* * * * *

The fact of the appellants' Unauthorized Absence during the week of August 3, 1981 is one element of the agency's evidence that appellants participated in an illegal strike against the United States Government. The other being the fact that a nationwide strike existed during the week of August 3, 1981. The agency moved that I take official notice of the strike called by PATCO. I note that in a decision issued on May 28, 1982, the Board concluded that the criteria for taking official notice, as provided for in 5 C.F.R. Section 1201.67 and defined in Federal Rule of

Evidence 210, had been met vis-a-vis the existence of a nationwide strike by air traffic controllers beginning August 3, 1981 and ending August 6, 1981. The Board based its conclusions on "common knowledge," "media coverage," "statements by PATCO officials" and "numerous findings by Federal district courts in injunctive proceedings," *Ketchem* v. *Department of Transportation,* MSPB Docket No. DA075281F0713 (May 28, 1982) (hereinafter *Ketchem*). The Board specifically found, subject to refutation, that an unlawful nationwide strike of air traffic controllers had occurred from August 3 through August 6, 1981. All parties to this appeal were notified of the Board's decision in this case by means of an order issued by the Regional Director of the Board's Philadelphia Regional Office. None of the appellants in this matter submitted evidence to refute the Board's findings. Hence, I find that there was a nationwide strike by air traffic controllers in existence from August 3 through August 6, 1981.

These appellants argue the agency failed to produce any direct evidence that they participated in the strike. Some general discussion of what the agency must prove to meet their evidentiary burden on this charge is appropriate. In *Schapansky v. Department of Transportation,* MSPB Docket No. DA075281F1130 (October 28, 1982) (hereinafter *Schapansky*), the Board determined that the existence of the strike was common knowledge, and that the agency can establish a *prima facie* case of an employee's voluntary participation therein by presenting evidence of his or her unauthorized absence from duty during the strike. *See also Jones v. Tennessee Valley Authority,* MSPB Docket No. AT07528010300 (February 19, 1982) and *Duckett and Yardley v. Tennessee Valley Authority,* MSPB Docket No. AT07528010325 (February 19, 1982). In a recent case, the Court further defined striking against the government as "picketing with co-workers during scheduled work hours," *American Postal Workers Union*

v. United States Postal Service, 682 F.2d 1280, 1284 (9th Cir. 1982). However, in a long line of cases dealing with whether an individual's actions can be deemed to be part of a "concerted activity" under the National Labor Relations Act, the Courts have held that an individual employee's actions can be deemed to be part of a concerted activity if they "have some relation to group action in the interest of the employees," *Anchortank, Inc. v. NLRB,* 618 F.2d 1153, 1161 (5th Cir. 1980). And, "it is also necessary . . . that the employee's actions themselves at least contemplate some group activity," *Pelton Casteel, Inc. v. NLRB,* 627 F.2d 23, 28 (7th Cir. 1980). The individual's actions must amount to action on behalf of other employees, *Aro, Inc. v. NLRB,* 596 F.2d, 713, 717 (6th Cir. 1979) and embody some element of "collected activity," *Krispy Kreme Doughnut Corp. v. NLRB,* 635 F.2d 304, 307 (4th Cir. 1980). Further, as the Board noted in *Schapansky, supra,* there need not be any overt physical actions by the employee to find that he or she acted in concert with other similarly situated employees, *see also Hugh H. Wilson Corp.,* 171 NLRB 1040, 1046 (1968).

The objectives of any strike include the prevention of an employer from carrying out its tasks by denying it the manpower to continue operations. Appellants, by absenting themselves from work at the same time the other Air Traffic Control Specialists were doing so, abetted the attempt of PATCO to hamper the agency's operations. I find that, contrary to appellants' assertions, they were in concert with other absentee controllers, and, that they were participating in a strike against the Government of the United States.

Appellants challenged the evidence relied upon by the agency in each of these cases, particularly the various documents referred to by Mr. Bernhard and Mr. Spanko in their testimony about each of them, alleging that it is insufficient as a matter of law. In general, I note that it is the

duty of the presiding official to evaluate all the testimony of the witnesses, and to consider their opportunity to observe the incident, their possible bias or prejudice, and their inherent believability, *Rias v. Veterans Administration,* MSPB Docket No. PH0752811044 (May 18, 1982). It is his responsibility to evaluate all the evidence relative to a witness' credibility and to assess the cumulative impact of all the evidence, *Flores v. Department of Labor,* MSPB Docket No. DA07528110503 (September 13, 1982). The presiding official must determine which evidence is to be given credit and greater weight when evidence conflicts, *Weaver v. Department of the Navy,* 2 MSPB 297 (1980). And, when versions of an incident as described by two witnesses directly conflict, the presiding official *must* resolve the question of credibility raised by the contradictory testimony, *see Wright v. Department of Health and Human Services,* MSPB Docket No. PH075209140 (March 17, 1981). The presiding official need not disbelieve all of any witness' testimony, and may choose to accept as true only certain protions of that testimony, *Antonucci v. Department of Justice,* MSPB Docket No. CH0752801057 (October 20, 1981). He may also accept contradicted and uncorroborated testimony, provided that it is "competent, credible and probative," *Hall v. Department of the Air Force,* p. 5, MSPB Docket No. SF075209137 (October 7. 1981). The presiding official must also evaluate all the hearsay evidence proffered by both parties, and determine which evidence should be accorded the greatest weight, *Borninkhof v. Department of Justice,* MSPB Docket No. SF075209003 (February 27, 1981) and *Schaeffer v. United States,* 633 F.2d 945 (Ct. Cl. 1980). The Time and Attendance Cards and Personnel Logs having been kept in the regular course of the agency's business are presumably reliable, and, in general, I have found all of the agency's records more reliable than the demurrers offered by the appellants.

* * * * *

Appellants point to the President's speech of 11:00 a.m., on August 3, 1981, and maintain that it denied them the right to due process since at that point their firings were predetermined. The President's statement read, in pertinent part, as follows:

> This morning at 7:00 a.m. the union representing those who man America's air traffic control facilities called a strike . . . I must tell those who failed to report for duty this morning they are in violation of the law and if they do not report for work within 48 hours they have forfeited their jobs and will be terminated. 17 Weekly Comp. Pres. Doc. 847 (August 3, 1981).

I find that no one was fired by this speech. For one thing it is clearly conditional in nature. The President was according to the striking employees an opportunity to put themselves in compliance with law. Admittedly, it contains a warning that those who continue to strike will be fired, but the announcement is consistent with what has been the agency's position throughout, that removal is the appropriate penalty for striking. With respect to the allegation that this speech rendered the appellants' oral and written replies futile, I note that all of the appellants were accorded an opportunity to make both an oral and written reply, but none of them used this chance to dispute the facts of their absences. Bernhard and Spanko testified that they examined the replies of all appellants to see if there was anything in them indicating that the charges were not true, and concluded that there was no information in the replies to counter the charges. Since the appellants were accorded their rights, I find no harmful error in this regard. I note that none of the instant appellants made an oral reply.

* * * * *

DECISION

* * * * *

The agency's decision to remove Carl E. Vaughn is sustained.

* * *

For the Board:

/s/ TERRENCE MCSTRAVICK
Terrence McStravick
Presiding Official

APPENDIX H

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER REGIONAL OFFICE

CASE NO. DE075281FO581
CASE NO. DE075281F0602

GARY J. AYERS, ET AL. [1]
MICHAEL M. HARP, ET AL.

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

DATE: Feb. 1, 1983

INITIAL DECISION

[Relevant excerpts relating to respondent Max Winter]

I. Introduction

Appellants Ayers and Harp are lead appellants for two groups of appellants consisting of 42 former Air Traffic Control Specialists who were employed at Stapleton International Airport Tower in Denver, Colorado. Appellants have appealed from the action of the agency (FAA) in removing them from their positions in August and September 1981.

* * * * *

The hearing on these appeals was held on November 29, 30, and December 1 and 2, 1982. A representative of the Leighton firm and the agency attended the hearing.

1/ [Footnote omitted]

BEST AVAIL

II. Jurisdiction

Under 5 U.S.C. 7701(a) (1978), an employee may file an appeal with the Board from an action which is appealable to the Board under any law, rule, or regulation. The statutory right of appeal for non-probationary employees who have been removed from the federal service is set forth in 5 U.S.C. 7511-7513 (1970). The instant appeals involve actions which are appealable to the Board, and the appeals were timely filed. See also 5 C.F.R. Part 752 (1982) for the regulatory provisions governing adverse actions and 5 C.F.R. 1201 (1982) concerning the practices and procedures followed by the Board in the adjudication of these types of appeals. Accordingly, these appeals have been accepted for adjudication.

III. Analysis and Findings

The agency actions are based on the following charges: (1) violation of 5 U.S.C. 7311 which provides that an individual may not hold a position with the U.S. Government if he or she participates in a strike against the government, and 18 U.S.C. 1918 which provides that participation in a strike against the U.S. Government is a crime for which a sentence of imprisonment can be imposed; and (2) for several days during August 1981, appellants were absent without authorization. The proposal notices also claim that at 7:00 a.m. EDT on August 3, 1981, a nationwide strike by Air Traffic Controllers occurred. The notices stated that because appellants refused to report for their first scheduled shift after August 3, 1981, they participated in that strike and were absent without official leave (AWOL).

Pursuant to 5 U.S.C. 7513(a) and 7701(c)(1)(B) (1978), the Board must sustain the agency's actions if it is supported by the preponderance of the evidence and was taken for such cause as would promote the efficiency of

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the service. However, the Board is required to overturn the agency's action even where it has met the evidentiary standard in any case where appellants can show that the agency action were founded on harmful procedural error, based on any prohibited personnel practice described in 5 U.S.C. 2302(b), or the agency's actions were not in accordance with the law. See 5 U.S.C. 7701(c)(2) (1978).

In addition to the consideration of alleged procedural violations which may be raised by appellants, adjudication of an appeal from any adverse action covered by section 7512 involves consideration of: (1) whether the alleged conduct actually occurred; (2) if so, whether any disciplinary action is warranted; and (3) whether the penalty imposed by the agency is appropriate. See *Douglas v. Veterans Administration*, M.S.P.B. Docket No. AT075299006 (April 10, 1981); *Allen v. U.S. Postal Service*, 2 M.S.P.B. 582 (1980); *Citizens to Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Phillips v. Bergland*, 586 F.2d 1007 (7th Cir. 1978); and *Young v. Hampton*, 568 F.2d 1253 (4th Cir. 1977).

Also, where the removal is based, in part, on a charge of absence without leave (AWOL), the agency must show: (1) that appellant was, in fact, absent on the dates in question; and (2) the action of placing appellant in an AWOL status, as opposed to other types of approved leave status, was proper. See *Bavier v. Department of Transportation*, M.S.P.B. Docket No. SE075209009 (February 10, 1981); *McDonough v. U.S. Postal Service*, 4 M.S.P.B. 441 (1980); and *In re Van Scriver*, 1 M.S.P.B. 94 (1979).

In support of its charges that appellants participated in a strike, the agency filed a motion with the Denver Regional Office on February 26, 1982, wherein it moved for the preceding officials to take official notice that a strike was commenced by the Professional Air Traffic Controllers Organization (PATCO), its members, agents, employees, and others acting in concert with them, on or

about August 3, 1981. After reviewing the evidence offered by the agency in suppport of the motion and any evidence provided by the parties in opposition to the motion, the Denver Regional Office issued an order on April 19, 1982, granting the motion. Upon receipt of *Ketchem v. Department of Transportation,* M.S.P.B. Docket No. DA075281F0713 (May 28, 1982), and in response to the Board's findings in that case, this office modified its taking of official notice by restricting the length of time involved to include from August 3 through August 6, 1982.

Under 5 C.F.R. 1201.67 (1982), where official notice is taken of any fact, a party's burden of proving that fact is satisfied. However, the taking of official notice that a strike by PATCO commenced on August 3 and continued through August 6 does not relieve the agency of proving that the appellants, in these cases, participated in the strike, or if appropriate, their participation continued after August 6, 1981.

The agency has presented evidence to show that the strike continued past August 6, 1981. The evidence consists of a newspaper article (Agency Ex. C), an opinion rendered by the Federal Labor Relations Authority (Agency Ex. D), and testimony by Temple Johnson, Manager of Denver Tower, which indicates that the union continued to strike well beyond the end of August 1981. Other evidence offered by the agency included a copy of a PATCO publication (Agency Ex. B) dated October 8, 1981, which is signed by Robert E. Poli, President of the PATCO, and addressed to all PATCO members. In that document, Mr. Poli states that "we are now 67 days into a strike that many of you thought would last no more than a few days or weeks."

In some cases, appellants have expressed confusion over the length of the strike due to various statements by government officials. But this alleged confusion is in direct conflict with the statements that were being made

by their own union officials at the national level. The national level officials had no doubt but that they were still engaged in a strike action, and this information was being disseminated to all members through union newsletters. The union initiated the strike, and there is no evidence that by the end of August, for purposes of these appeals, that the union had declared the strike to be over.

According, I find that evidence of appellants actions along with the other evidence presented by the agency clearly shows that the strike continued after August 6.

Regarding the charges of participating in a strike, in *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C. 1971), *aff'd* 92 S.Ct. 80, 404 U.S. 802 (1972), the court defined the words "strike" and "participate" as they are used in statutes relating to striking against the U.S. Government. Those words, are used in such statutes, mean "an actual refusal in concert with others to provide services to one's employer." Further, in *Schapansky v. Department of Transportation*, M.S.P.B. Docket No. DA075281F1130 (October 28, 1982), the Board held that the agency could make a *prima facie* case that a person was withholding services in concert with others, i.e., striking, by showing the employee's unauthorized absence from duty during the course of the strike. It is not necessary for the agency to demonstrate that appellant took part in picketing activities. *Schapansky, supra.*

Such a *prima facie* case may be rebutted by the employee by showing that he had no knowledge of the strike or by showing that his absence was due to some other factor than intentional participation in the strike. *Schapansky, supra.* The agency must, of course, prove participation in the strike by the preponderance of the evidence. See 5 U.S.C. 7701(c)(1)(B) (1978). See also *Schapansky, supra.*

In considering both the charge of striking and AWOL, it is noted that the specifications set out in the charges are limited by the date the agency issued each appellant a notice of proposed removal. Since 5 U.S.C. 7513(b)(1) (1978) entitles each appellant to be notified in writing of all specific reasons for the proposal action, it would be improper for the agency to charge appellants with other acts of alleged misconduct without issuing a new notice or an amendment to the original notice. Clearly, this does not restrict the agency from submitting evidence concerning events that occurred after the issuance of the proposal notices, but that evidence, in ordered [*sic*] to be considered in this appeal, must be relevant to the specifications set out in the notices.

In support of the charges of AWOL, the agency presented the testimony of Johnson to show that appellants were assigned shifts by the agency at some point in time from August 3, 1981, through August 24, 1981. The agency offered a summary of the assigned shifts for all appellants which had been prepared by Johnson (Agency Ex. AAA). Johnson also testified that due to an operational emergency, he had taken steps to cancel all approved leave effective August 1, 1981. In some cases, the agency was unable to contact some of the appellants who had already left on their respective vacations. In those cases, appellants were expected to resume their normal shifts or other assigned shifts as soon as they were contacted and their leave was canceled, or if the agency was unable to contact them, to resume their normal shifts upon the completion of their scheduled leave. However, in all cases, Johnson has stated that the appellants were absent without authorization and, in every case, appellants failed to contact the agency to request leave or to offer an explanation for their absence during the time in question. Johnson also

stated that all appellants were placed in an AWOL status for each day they were assigned a shift and did not report for duty.

With the exception of certain appellants, discussed below, it is undisputed that appellants were absent without official leave as charged. Accordingly, the charges of AWOL are sustained against these appellants.

* * * * *

Winter contends that he was a part of the PATCO national bargaining team. As a member of that team, he was required to attend the negotiations in Washington, D.C., on or about August 3, 1981. His attendance was at the request of the chief spokesman (Reardon) for PATCO's negotiating team. In an affidavit prepared by Dennis Reardon, he (Reardon) admits that he failed to follow the usual procedures in notifying the agency of his actions but contends that his actions were proper. Further, that Winter should have been placed in a proper pay status while attending that union session.

The agency asserts that Winter was contacted by his supervisor on August 2 and advised that he was expected to report for duty. Winter did not inform the supervisor of this pending trip to Washington, D.C., during that conversation. In fact, Winter did not even indicate that he would not be reporting as directed. Johnson testified that procedures had been established for releasing those working controllers from duty to attend the negotiating sessions. In the case of Winter, those procedures were not followed, and therefore, Winter was absent without authorization. It is also noted that an affidavit prepared by Edward Curran on August 9, 1982, indicates that Winter was not an authorized member of the team after July 31, 1981. In view of this evidence, I find that Winter's attendance at the meeting in Washington, D.C., did not excuse or relieve him from the responsibility of either reporting or obtaining clearance from the agency to attend

the meeting. Accordingly, I find that the agency's action of placing Winter in an AWOL status during the time in question was proper. The charge of AWOL is sustained.

* * * * *

Regarding the charges of striking, the evidence shows that all of the appellants were AWOL (unauthorized absence) during the course of a nationwide strike by PATCO. Therefore, I find that the agency has established a *prima facie*, case that all appellants were participating in the strike.

Based on a *prima facie* showing by the agency, the burden of going forward with the evidence shifts to appellants. Appellants have not produced any credible evidence to show that they had no knowledge of the strike.

* * * * *

Accordingly, I find that none of the appellants have presented any credible evidence to rebut the agency's *prima facie* case. Therefore, I find that the agency's *prima facie* case is sufficient to support the charge that appellants were striking against the federal government by the required standard of proof, and the charges are sustained.

* * * * *

Appellants' argument that President Reagan made the decision to fire all air traffic controllers on August 3, 1981, is not persuasive. I find that President Reagan's statement on August 3, 1981, was his summary of the law that those federal employees who participated in a strike against the federal government would be removed. That is, the President was stating the policy his administration would follow in response to appellants' actions.

In addition to recognizing this law, President Reagan granted a grace period to those air traffic controllers who returned within 48 hours. If appellants were confused by

this statement, the best way to clarify the matter would have been to call local officials and question them about the matter.

* * * * *

IV. Decision

The agency actions of removing appellants are hereby AFFIRMED. However, the agency is ordered to pay all appellants for the period from their attempted return to duty until their removals were effected.

An appropriate official of the agency must furnish this office with evidence of its compliance with the order concerning appellants within ten (10) calendar days of the date the decision and order become final. If the agency files a petition for review, an informational copy of it should be sent to this office for its compliance records.

* * * * *

For the Board:

/s/ JOSEPH H. HARTMAN
Joseph H. Hartman
Presiding Official

APPENDIX I

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER REGIONAL OFFICE

CASE NO. SE075281F0263

ROBERT A. BOYD, ET AL. [1]

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

DATE: Jan. 26, 1983

INITIAL DECISION

[Relevant excerpts relating to respondent David Fitzgerald]

I. Introduction

Appellant Boyd is the lead appellant for a group of 26 former Air Traffic Control Specialists who were employed at the Anchorage TRACON, Anchorage, Alaska. Appellants have appealed from the action of the Federal Aviation Administration in removing them from their positions in August 1981. Pursuant to 5 C.F.R. 1201.36(b) (1982), these appeals were consolidated for hearing and adjudication based on commonality of issues and facility. The appeals were originally filed in the Board's Seattle Regional Office; however, due to the administrative work

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1/ [Footnote omitted]

load in that office, the appeals were transferred to the Denver Regional Office for a hearing and adjudication.

* * * * *

The hearing on these appeals was held on October 6, 7, and 12, 1982.

II. JURISDICTION

Under 5 U.S.C. 7701(a) (1978), an employee may file an appeal with the Board from an action which is appealable to the Board under any law, rule, or regulation. The statutory right of appeal for non-probationary employees who have been removed from the federal service is set forth in 5 U.S.C. 7511-7513 (1978). The instant appeals involve actions which are appealable to the Board, and the appeals were timely filed. See also 5 C.F.R. Part 752 (1982) for the regulatory provisions governing adverse actions and 5 C.F.R. 1201 (1982) concerning the practices and procedures followed by the Board in the adjudication of these types of appeals. Accordingly, these appeals have been accepted for adjudication.

III. ANALYSIS AND FINDINGS

The agency actions are based on the following charges: (1) violation of 5 U.S.C. 7311 which provides that an individual may not hold a position with the U.S. Government if he or she participates in a strike against the government, and 18 U.S.C. 1918 which provides that participation in a strike against the U.S. Government is a crime for which a sentence of imprisonment can be imposed; and (2) for several days during August 1981, appellants were absent without authorization. The proposal notices also claim that at 7:00 a.m. EDT on August 3, 1981, a nationwide strike by Air Traffic Controllers occurred. The notices stated that because appellants refused to report for their first scheduled shift after August 3, 1981, they

participated in that strike and were absent without official leave (AWOL).

Pursuant to 5 U.S.C. 7513(a) and 7701(c)(1)(B) (1978), the Board must sustain the agency's action if it is supported by the preponderance of the evidence and was taken for such cause as would promote the efficiency of the service. However, the Board is required to overturn the agency's action even where it has met the evidentiary standard in any case where appellant can show that the agency action was founded on harmful procedural error, based on any prohibited personnel practice described in 5 U.S.C. 2301(b), or the agency's action was not in accordance with the law. See 5 U.S.C. 7701(c)(2) (1978).

In addition to the consideration of alleged procedural violations which may be raised by appellant, adjudication of an appeal from any adverse action covered by section 7512 involves consideration of: (1) whether the alleged conduct actually occurred; (2) if so, whether any disciplinary action is warranted; and (3) whether the penalty imposed by the agency is appropriate. See *Douglas v. Veterans Administration,* M.S.P.B. Order No. AT075299006 (April 10, 1981); *Allen v. U.S. Postal Service,* 2 M.S.P.B. 582 (1980); *Citizens to Protect Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971); *Phillips v. Bergland,* 586 F.2d 1007 (7th Cir. 1978); and *Young v. Hampton,* 568 F.2d 1253 (4th Cir. 1977).

Also, where the removal is based, in part, on a charge of absence without leave (AWOL), the agency must show: (1) that appellant was, in fact, absent on the dates in question; and (2) the action of placing appellant in an AWOL status, as opposed to other types of approved leave status, was proper. See *Bavier v. Department of Transportation,* M.S.P.B. Order No. SE075209009 (February 10, 1981); *McDonough v. U.S. Postal Service,* 4 M.S.P.B. 441 (1980); and *In re Van Sciver,* 1 M.S.P.B. 94 (1979).

In support of its charge that appellants participated in a strike, the agency filed a motion with the Denver Regional Office on February 26, 1982, wherein it moved for the presiding officials to take official notice that a strike was commenced by the Professional Air Traffic Controllers Organization (PATCO), its members, agents, employees, and others acting in concert with them, on or about August 3, 1981. After reviewing the evidence offered by the agency in support of the motion and any evidence provided by the parties in opposition to the motion, the Denver Regional Office issued an order on April 19, 1982, granting the motion. Upon receipt of *Ketchem v. Department of Transportation,* M.S.P.B. Order No. DA075281F0713 (May 28, 1982), and in response to the Board's findings in that case, this office modified its taking of official notice by restricting the length of time involved to include from August 3 through August 6, 1982.

Under 5 C.F.R. 1201.67 (1982), where official notice is taken of any fact, a party's burden of proving that fact is satisfied. However, the taking of official notice that a strike by PATCO commenced on August 3 and continued through August 6 does not relieve the agency of proving that the appellants, in these cases, participated in the strike, or if appropriate, their participation continued after August 6, 1981.

Regarding the charges of participating in a strike, in *United Federation of Postal Clerks v. Blount,* 325 F. Supp. 879 (D.D.C. 1971), *aff'd* 92 S.Ct. 80, 404 U.S. 802 (1972), the court defined the words "strike" and "participate" as they are used in statutes relating to striking against the U.S. Government. Those words, as used in such statutes, mean "an actual refusal in concert with others to provide services to one's employer." Futher, in *Schapansky v. Department of Transportation,* M.S.P.B. Docket No. DA075281F1130 (October 28, 1982), the Board held that the agency could make a *prima facie* case

that a person was withholding services in concert with others; i.e., striking, by showing the employee's unauthorized absence from duty during the course of the strike. It is not necessary for the agency to demonstrate that appellant took part in picketing activities. *Schapansky, supra.*

Such a *prima facie* case may be rebutted by the employee by showing that he had no knowledge of the strike or by showing that his absence was due to some other factor than intentional participation in the strike. *Schapansky, supra.* The agency must, of course, prove participation in the strike by the preponderance of the evidence. See 5 U.S.C. 7701(c)(1)(B) (1978). See also *Schapansky, supra.*

Since one of the criteria to be considered in the charges of striking relates to appellants' absences during the strike, I will turn first to a consideration of the charges of absence without leave (AWOL).

At the hearing, the agency and the representative from the Leighton firm stipulated to the following facts: (1) all appellants signed an oath of office and affidavit, at the time of their appointment to a position with the FAA, avowing not to participate in a strike against the federal government; (2) each appellant had received a briefing on the illegalities of striking prior to August 3, 1981; and (3) none of the appellants were at work after August 3, 1981. Under 5 C.F.R. 1201.66 (1982), the agency's burden of establishing the foregoing facts is satisified. It is noted that Evanoff was not included in this stipulation. Therefore, the agency still has the burden of establishing those facts in his case.

The agency has presented time and attendance records, various written statements prepared by supervisors during the time in question and testimony at the hearing by Mr. Joritz, the Manager of the Anchorage TRACON, to show that all of the appellants were scheduled for duty at some

point in time between the dates of August 3 and August 6, 1981. Joritz testified in detail about each appellant concerning their assigned shifts. He stated that all of the appellants were placed in an AWOL status during the time in question because they did not report for duty as scheduled, and they had not contacted the agency to explain their absences from duty. Joritz also testified that Evanoff was assigned several shifts during the same period of time, but he did not report for duty or contact the agency to explain his absence from duty. Therefore, he was also placed in an AWOL status. With the exception of Ronaldson and Fitzgerald, none of the appellants have presented any evidence or argument to refute the fact as presented by the agency on the charges of AWOL.

* * * * *

Regarding Fitzgerald, he argues that as a part of the PATCO national bargaining team he was required to travel to Washington, D.C., on or about August 1, 1981, at the request of Dennis M. Reardon, chief spokesman for PATCO's negotiating team. In an affidavit prepared by Reardon dated September 18, 1982, Reardon admits that he failed to follow usual procedures in notifying the agency of his actions, but contends that his actions were proper and Fitzgerald should have been placed in a proper pay status during the time in question.

The agency argues that Fitzgerald did not follow the proper procedures for obtaining clearance from the appropriate agency officials to attend any meeting in Washington, D.C. Dean Childs, Manager of the Labor Relations Branch in the Alaska Region, testified that he was responsible for coordinating with the agency's national labor office on the attendance of working controllers as regional representatives at the national negotiating sessions. He stated that Fitzgerald did not follow any of the normal procedures, agreed to between

the agency and the union, in attending the meeting in Washington, D.C. Therefore Childs contends that Fitzgerald's absence from his assigned shift was unauthorized. It is also noted that an affidavit prepared and signed by Edward V. Curran on August 9, 1981, indicated that Fitzgerald was not even an authorized member of the national negotiating team anytime after July 31, 1981. Curran is the Director of the agency's Office of Relations. In view of this evidence, I find that Fitzgerald's attendance at a meeting in Washington, D.C. did not excuse or relieve him from the responsibility of either reporting for duty as scheduled or obtaining the necessary clearance and authorization to attend the meeting.

Accordingly, I find that the agency has sustained the burden of proving that appellants (including Ronaldson and Fitzgerald) were absent from certain shifts, as charged, without official leave. Therefore, the charges of AWOL are sustained.

Regarding the charges of striking, the evidence shows that all of the appellants, including Evanoff, were AWOL during the course of a nationwide strike by PATCO. In view of the foregoing, I find that the agency has established a *prima facie* case that all of the appellants were participating in the strike.

Based on a *prima facie* showing by the agency, the burden of going forward with the evidence shifts to appellants. Appellants have not produced any credible evidence to show that they had no knowledge of the strike or that their absences were due to some other factor than intentional participation in the strike or any other evidence to rebut the agency's evidence on this charge. Accordingly, I find the agency's *prima facie* case is sufficient to support its charge that appellants were striking against the federal government by the required standard of proof, and that charge is sustained.

* * * * *

In summary, the agency charges are supported by the preponderance of the evidence and the actions taken promote the efficiency of the service. Further, the penalty imposed was not unreasonable. Also, the agency did not commit harmful error in the processing of their actions.

IV. DECISION

The agency action of removing appellants is hearby affirmed.

* * * * *

For the Board:

/s/ JOSEPH H. HARTMAN
Joseph H. Hartman
Presiding Official

APPENDIX J

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

CASE NO. AT075281F2351

GERALD L. AGOLINI, ET AL. [1]

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

DATE: Jan. 14, 1983

[Relevant excerpts relating to respondent William Sedgwick]

INTRODUCTION

Appellants filed appeals from the agency's actions removing them from the position of Air Traffic Control Specialist.

JURISDICTION

The actions appealed were effected under subpart D of Part 752 of the Office of Personnel Management regulations, which was promulgated pursuant to OPM's authority under 5 U.S.C. § 7514. The record reflects that appellants were covered employees as defined by subpart D, and were entitled to appeal these actions to the Board. See 5 U.S.C. §§ 7511(a)(1)(A), 7512, 7513(d); 5 C.F.R.

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[1] This decision encompasses the appeals of 94 former air traffic controllers * * *.

§§ 752.401(a), 752.401(b)(1), 752.405(a). I therefore find that the appeals are properly before the Board for adjudication.

ANALYSIS AND FINDINGS

The agency proposed appellants' removals on the basis of two charges: (1) participation in a strike against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918; and (2) unauthorized absence. Both charges stem from appellants' failure to report for duty on various dates in August of 1981.

The Board has taken official notice of the fact that members of the Professional Air Traffic Controllers Organization (PATCO) engaged in an illegal strike against the Federal Government from August 3, 1981 through at least August 6, 1981. *Ketchem v. Department of Transportation,* MSPB Docket No. DA075281F0713 (5/28/82). In addition, the Board has found that an employee's unauthorized absence during the period of such a strike may constitute a prima facie case of said employee's participation therein. *Schapansky v. Department of Transportation,* MSPB Docket No. DA0725281F1130 (10/28/82); *Jones v. Tennessee Valley Authority,* MSPB Docket No. AT07528010300 (2/19/82); *Ducket and Yardley v. Tennessee Valley Authority,* MSPB Docket No. AT07528010325 (2/19/82).

Striking has been defined as the "actual refusal in concert with others to provide services to one's employer." *United Federation of Postal Clerks v. Blount,* 325 F. Supp. 879 (D.D.C.), *affirmed,* 404 U.S. 802 (1971). In *Ketchem, supra* at page 9, the Board stated that where an employee is charged with participation in the PATCO strike "on dates subsequent to August 6, 1981, the agency bears the burden of proving by direct evidence that a strike was in fact in progress on the date charged, and that the employee could have returned to work on that date." In

this regard, there is no dispute that an employee who failed to report for his or her "deadline shift" (the first regularly scheduled shift after 11:00 a.m. on August 5, 1981), would not have been returned to an active duty status if he or she attempted to return after his or her deadline has passed. While picketing and other "strike activity" continued for several weeks, or even months, after August 6, 1981, the agency effectively ended any particular employee's participation in the strike after the employee had missed the "deadline shift", and no longer had an opportunity to "provide services", per se. My findings below with respect to the striking charge will therefore be limited to each appellant's duty days from August 3, 1981 through the date of his or her "deadline shift". This same rationale, however, is inapplicable to the charge of unauthorized absence. Notwithstanding the fact that an employee would not have been placed in an active duty status if he or she attempted to return to work after his or her deadline had passed, such an employee could have been entitled to be placed in a non-duty status, with pay. At a minimum, any absences on and after the date that the agency rebuffed his or her offer to return to work would be "authorized", regardless of the pay or leave status recorded by the agency. However, unless the employee appeared for duty, or otherwise communicated to the agency a desire to return to work, I find that the agency could validly charge the employee with unauthorized absence on previously scheduled duty days subsequent to his or her deadline.

The agency presented the testimony of the Chief or Deputy Chief of each of the three facilities involved, and/or documentary evidence (watch schedules, sign-on logs, memoranda and/or time and attendance records) to establish that each of the appellants was absent without authorization on one or more days during the strike, and that each failed to report for his or her "deadline shift". I

find this evidence to be sufficient to establish a prima facie case of strike participation with respect to each of the appellants. In light of this finding, the burden of persuasion now shifts to each appellant to show that he or she "had no knowledge of the existence of the strike or to demonstrate that his [or her] absence was due to some factor other than intentional participation in the strike." *Schapansky, supra* at 6. In this regard, several of the appellants did allege specific reasons for their absences. Each will be addressed below.

William Sedgwick became a member of PATCO's national negotiating team in June of 1980 and, prior to August of 1981, he made several trips to Washington, D.C. in connection with contract negotiations. On each of these occasions, he received prior approval from his Chief, John Atkinson, who authorized the issuance of a Government Travel Request (GTR) for appellant's airline tickets and, if time allowed, the issuance of a travel advance. Appellant claims that he went to Washington, D.C. on August 2, 1981 based upon a July 30 or 31, 1981 communication from Robert Poli, President of PATCO National. He testified that he did not request Mr. Atkinson's approval of the trip because Mr. Poli had told him to keep it a "secret", and because Mr. Atkinson had once told him that he need not get his approval in advance if he got a "last minute" call. He also testified that he believed himself to be on administrative leave on and after August 3, 1981.

I find Mr. Sedgwick's explanation of his absences to be incredible for several reasons. There was no "last minute" notice of the trip. Appellant knew of the trip 2-3 days prior to his departure, yet did not request Mr. Atkinson's approval. Nor did he subsequently contact Mr. Atkinson to obtain approval as he was supposed to under his own "last minute" scenario. In addition, the agency submitted an affidavit from the Director of FAA's Office of Labor

Relations who stated that PATCO had not requested, nor had his office approved, the attendance of Mr. Sedgwick at any negotiating sessions after June of 1981. (Agency Ex. 4). On cross examination, appellant admitted that he attended no negotiating sessions in August of 1981, but rather was waiting to review any proposed contract. Had the trip been authorized, there would have been no reason to keep it a "secret". I therefore find that appellant's trip and his absences on and after August 3, 1981 were unauthorized, and that appellant was so aware. I further find that his absences were not the result of any belief on his part that he was on administrative leave.

* * * * *

I find that the agency has established a prima facie case of strike participation with respect to all of the appellants, and that none of them has presented persuasive evidence in rebuttal. The same evidence establishes that appellants were absent without authorization, as alleged. I therefore find that the charges as set forth in the proposal notices are supported by a preponderance of the evidence, and are sustained.

* * * * *

For the Board:

/s/ JOSEPH E. CLANCY
Joseph E. Clancy
Presiding Official

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